92-245

FILED
AUG 6 1992
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

ANHEUSER-BUSCH, INCORPORATED,
Petitioner,

v.

L&L WINGS, INC., and
VENTURE MARKETING, INC.,
Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

---

PETITION FOR WRIT

MILES J. ALEXANDER*
JERRE B. SWANN
VIRGINIA S. TAYLOR
WILLIAM H. BREWSTER
THEODORE H. DAVIS, JR.

KILPATRICK & CODY
1100 Peachtree Street
Atlanta, Georgia 30309-4530
(404) 815-6500

**Counsel of Record for Petitioner*

OF COUNSEL:

JOHN E. CUTTINO
TURNER, PADGET, GRAHAM & LANEY
1901 Main Street
Columbia, South Carolina 29202
(803) 254-2200

August 6, 1992

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

Questions Presented

The district court granted plaintiff's motion for judgment notwithstanding the verdict ("JNOV") based on defendants' admitted copying and use on T-shirts of plaintiff's famous design trademark, which is the subject of a federal registration for T-shirts. The district court did not rule on plaintiff's new trial motion. The Fourth Circuit majority reversed the district court's entry of JNOV, over the dissent of Justice Powell, and summarily dismissed plaintiff's new trial motion. The questions presented are:

1. Whether the Fourth Circuit, after reversing JNOV, must remand an unadjudicated new trial motion, which is the uniform procedure in other Circuits, or may it deny the new trial motion without the trial court's ruling?

2. Whether the Lanham Act's likelihood of confusion standard for trademark infringement, which all other Circuits evaluate through interrelated marketplace factors, precludes the Fourth Circuit's test, consisting of an abstract side-by-side comparison of marks and ignoring the impact of the marks on consumers in the marketplace?

3. Whether the Lanham Act's mandate that a registrant is presumed to have the "exclusive right to use" a mark on the goods for which the trademark is registered precludes allowing a direct competitor to deliberately copy a registered design mark and avoid liability for infringement by merely adding generic, geographic, and other descriptive words?

4. Whether a judicially created "parody defense" to trademark infringement, permitting the unauthorized, commercially competitive use of a famous federally registered trademark conflicts with the Lanham Act likelihood of confusion test for infringement and its underlying policies?

List of Parties

The caption to this case contains the names of all parties to this proceeding in the United States Court of Appeals for the Fourth Circuit, whose judgment is sought to be reviewed. Anheuser-Busch Companies, Inc., the parent company of petitioner Anheuser-Busch, Incorporated, is the only entity required to be disclosed under Rule 29.1 of the Rules of the Supreme Court of the United States.

Table of Contents

	Page
QUESTIONS PRESENTED	i
LIST OF PARTIES	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED	1
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE PETITION	4
I. THE FOURTH CIRCUIT'S PEREMPTORY DENIAL OF AND REFUSAL TO REMAND PLAINTIFF'S UNADJUDICATED NEW TRIAL MOTION CONFLICTS WITH THE FEDERAL RULES OF CIVIL PROCEDURE, PRECEDENT OF THIS COURT, AND DECISIONS IN OTHER CIRCUITS	5
A. The Fourth Circuit's Refusal to Remand Plaintiff's New Trial Motion Conflicts With This Court's Precedent and Decisions in Other Circuits	6
B. The Requirement to Remand Unadjudicated New Trial Motions Is Unequivocal and Based on Sound Jurisprudence	8
II. THE FOURTH CIRCUIT'S DECISION IS IN IRRECONCILABLE CONFLICT WITH DECISIONS IN ALL OTHER CIRCUITS AND WITH THE LANHAM ACT ON THE ISSUES OF THE LEGAL TEST FOR INFRINGEMENT, THE STATUTORY RIGHTS OF REGISTRANTS, AND THE DEFENSE OF PARODY	12

A. The Fourth Circuit's "Intrinsic Similarity" Test for Trademark Infringement Ignores Marketplace Factors Evidencing Infringement as a Matter of Law, and Conflicts with Precedent of Other Circuits and the Lanham Act 13

1. The Fourth Circuit Reached Its Aberrant Result by Engaging in a Universally Condemned Side-by-Side Analysis 16

2. The Fourth Circuit Wholly Ignored the Legal Effect of the Admitted Fame and Resulting Strength of Plaintiff's Design Trademark 18

3. The Fourth Circuit's Decision That Intentional Copying Does Not Raise a Presumption of Likelihood of Confusion Conflicts with Decisions in Other Circuits 19

B. The Fourth Circuit, by Ignoring the Statutory Significance of Plaintiff's Registration, Which Constitutes Prima Facie Evidence of the Exclusive Right to Use the Mark, and by Allowing Descriptive Matter to Assume Decisive Significance, Conflicts with the Lanham Act and Decisions in Other Circuits 21

C. The Fourth Circuit's Newly Created Parody Defense for the Unauthorized, Competitive Use of a Federally Registered Mark Conflicts with the Lanham Act and Decisions in Other Circuits 25

CONCLUSION 30

Table of Authorities

Cases:

Aetna Casualty & Sur. Co. v. Aetna Auto Fin., Inc., 123 F.2d 582 (5th Cir. 1941), cert. denied, 315 U.S. 824 (1942) 20

Aetna Casualty & Sur. Co. v. Yeatts, 122 F.2d 350 (4th Cir. 1941) 9

Allied Chem. Corp. v. Daiflon, Inc., 449 U.S. 33 (1980) 7,11

American Auto. Ins. Co. v. American Auto Club, 184 F.2d 407 (9th Cir. 1950) 17

American Chicle Co. v. Topps Chewing Gum, Inc., 208 F.2d 560 (2d Cir. 1953) 19

American Heritage Life Ins. Co. v. Heritage Life Ins. Co., 494 F.2d 3 (5th Cir. 1974) 21-22

Ameritech, Inc. v. American Info. Technologies Corp., 811 F.2d 960 (6th Cir. 1987) 18

AMF, Inc. v. Sleekcraft Boats, 599 F.2d 341 (9th Cir. 1979) 13-14,27

AMP, Inc. v. Foy, 540 F.2d 1181 (4th Cir. 1976) 14

Anheuser-Busch, Inc. v. L & L Wings, Inc., 962 F.2d 316 (4th Cir. 1992) ..... *passim*

Anti-Defamation League of B'Nai B'Rith v. National Mexican Am. Anti-Defamation Committee, Inc., 510 F.2d 1246 (D.C. Cir. 1975) 23

Atkins v. Halliburton Oil Well Cementing Co., 196 F.2d 876 (5th Cir. 1952) 7

Baker v. Simmons Co., 307 F.2d 458 (1st Cir. 1962) 20

Barr Rubber Prods. Co. v. Sun Rubber Co., 425 F.2d 1114 (2d Cir.), *cert. denied*, 400 U.S. 878 (1970) 22

Beer Nuts, Inc. v. Clover Club Foods Co., 805 F.2d 920 (10th Cir. 1986) 14,16

Bellbrook Dairies, Inc. v. Hawthorn-Mellody Farms Dairy, Inc., 253 F.2d 431 (C.C.P.A. 1958) 22-23

Table of Authorities Continued

Page

Bon Ami Co. v. McKesson & Robbins, Inc., 93 F.2d 915 (C.C.P.A. 1938) 24

Boston Athletic Ass'n v. Sullivan, 867 F.2d 22 (1st Cir. 1989) 13,14,17,18,19-20

Boston Professional Hockey Ass'n v. Dallas Cap & Emblem Mfg., Inc., 510 F.2d 1004 (5th Cir.), *cert. denied*, 423 U.S. 868 (1975) 21,23

Carl Zeiss Stiftung v. VEB Carl Zeiss Jena, 433 F.2d 686 (2d Cir. 1970), *cert. denied*, 403 U.S. 905 (1971) 13,23

Casper v. Barber & Ross Co., 288 F.2d 379 (D.C. Cir. 1961) 7,8-9

Chemical Corp. of Am. v. Anheuser-Busch, Inc., 306 F.2d 433 (5th Cir. 1962), *cert. denied*, 372 U.S. 965 (1963) 30

Chevron Chem. Co. v. Voluntary Purchasing Groups, Inc., 659 F.2d 695 (5th Cir. Unit A 1981), *cert. denied*, 457 U.S. 1126 (1982) 14,16,19

Clements v. General Accident Ins. Co., 821 F.2d 489 (8th Cir. 1987) 7

Cliff's Notes, Inc. v. Bantam Doubleday Dell Pub. Group, Inc., 886 F.2d 490 (2d Cir. 1989) 26,27

Coit Drapery Cleaners, Inc. v. Coit Drapery Cleaners, Inc., 423 F. Supp. 975 (E.D.N.Y. 1976) . 22

Cone v. West Virginia Pulp & Paper Co., 330 U.S. 212 (1947) 11

Dallas Cowboys Cheerleaders, Inc. v. Pussycat Cinema, Ltd., 604 F.2d 200 (2d Cir. 1979) 25,26

DeCosta v. Viacom Int'l, Inc., 758 F. Supp. 807 (D.R.I. 1991) 22

Dieter v. B&H Indus., Inc., 880 F.2d 322 (11th Cir. 1989), *cert. denied*, 111 S. Ct. 369 (1990) 14

Fairmont Glass Works v. Cub Fork Coal Co., 287 U.S. 474 (1933) 7

Felton v. Spiro, 78 F. 576 (6th Cir. 1897) 9

Table of Authorities Continued

	Page
Fleischmann Distilling Corp. v. Maier Brewing Co., 314 F.2d 149 (9th Cir.), *cert. denied*, 374 U.S. 830 (1963)	16
Frisch's Restaurants, Inc. v. Elby's Big Boy, Inc., 670 F.2d 642 (6th Cir.), *cert. denied*, 459 U.S. 916 (1982)	13
Fuji Photo Film Co. v. Shinohara Shoji Kabushiki Kaisha, 754 F.2d 591 (5th Cir. 1985)	13
Gates v. L.G. DeWitt, Inc., 528 F.2d 405 (5th Cir. 1976)	10
Gill v. Rollins Protective Servs. Co., 836 F.2d 194 (4th Cir. 1987)	9
Gordon Mailloux Enters., Inc. v. Firemen's Ins. Co., 366 F.2d 740 (9th Cir. 1966)	7
Grey v. Campbell Soup Co., 650 F. Supp. 1166 (C.D. Cal. 1986), *aff'd without op.*, 830 F.2d 197 (9th Cir. 1987)	29-30
Hampton v. Magnolia Towing Co., 338 F.2d 303 (5th Cir. 1964)	10
Hard Rock Cafe Licensing Corp. v. Pacific Graphics, Inc., 776 F. Supp. 1454 (W.D. Wash. 1991)	11,26,29
Harold F. Ritchie, Inc. v. Chesebrough-Pond's, Inc., 281 F.2d 755 (2d Cir. 1960)	14,16
Helene Curtis Indus., Inc. v. Church & Dwight Co., 560 F.2d 1325 (7th Cir. 1977), *cert. denied*, 434 U.S. 1070 (1978)	13
HMH Publishing Co. v. Brincat, 504 F.2d 718 (9th Cir. 1974)	19
In re E.I. DuPont de Nemours & Co., 476 F.2d 1357 (C.C.P.A. 1973)	14
International Kennel Club v. Mighty Star, Inc., 846 F.2d 1079 (7th Cir. 1988)	23,28
International News Serv. v. Associated Press, 248 U.S. 215 (1918)	29

Table of Authorities Continued

Page

Interpace Corp. v. Lapp, Inc., 721 F.2d 460 (3d Cir. 1983) 13

Inwood Lab., Inc. v. Ives Lab., Inc., 456 U.S. 844 (1982) 13

James Burrough, Ltd. v. Sign of Beefeater, Inc., 540 F.2d 266 (7th Cir. 1976) 16,19,22,23

John H. Harland Co. v. Clarke Checks, Inc., 711 F.2d 966 (11th Cir. 1983) 16,18

Keds Corp. v. Renee Int'l Trading Corp., 888 F.2d 215 (1st Cir. 1989) 23

Keebler Co. v. Rovira Biscuit Corp., 624 F.2d 366 (1st Cir. 1980) 22

Kenner Parker Toys, Inc. v. Rose Art Indus., Inc., 963 F.2d 350 (Fed. Cir. 1992) 14,18-19

L.L. Bean, Inc. v. Drake Publishers, Inc., 811 F.2d 26 (1st Cir.), *cert. denied*, 483 U.S. 1013 (1987) 29

Levi Strauss & Co. v. Blue Bell, Inc., 632 F.2d 817 (9th Cir. 1980) 16-17,18,23

Lloyd Corp. v. Tanner, 407 U.S. 551 (1972) 30

Lowe v. Conlee, 742 F.2d 1140 (8th Cir. 1984) 7

Magee v. General Motors Corp., 213 F.2d 899 (3d Cir. 1954) 7

Marsh v. Illinois Cent. Rail Co., 175 F.2d 498 (5th Cir. 1944) 10

Mays v. Pioneer Lumber Corp., 502 F.2d 106 (4th Cir. 1974), *cert. denied*, 420 U.S. 927 (1975) . 8

Miles Shoes, Inc. v. Macy & Co., 199 F.2d 602 (2d Cir. 1952), *cert. denied*, 345 U.S. 909 (1953) . 24

Minthorne v. Seeburg Corp., 397 F.2d 237 (9th Cir. 1968), *cert. denied*, 397 U.S. 1036 (1970) 7

Mishawaka Rubber & Woolen Mfg. Co. v. S.S. Kresge Co., 316 U.S. 203 (1942) 12

Mobil Oil Corp. v. Pegasus Petroleum Corp., 818 F.2d 254 (2d Cir. 1987) 18,19

Table of Authorities Continued

Page

Montgomery Ward & Co. v. Duncan, 311 U.S. 243 (1940) 6,7,9,11

Murphy v City of Long Beach, 914 F.2d 183 (9th Cir. 1990) 8,10

Mutual of Omaha Ins. Co. v. Novak, 648 F. Supp. 905 (D. Neb. 1986), *aff'd*, 836 F.2d 397 (8th Cir. 1987), *cert. denied*, 488 U.S. 933 (1988) 13,14,16,26,29,30

My-T Fine Corp. v. Samuels, 69 F.2d 76 (2d Cir. 1934) 19-20

Nodak Oil Co. v. Mobil Oil Corp., 526 F.2d 798 (8th Cir. 1975) 7,8

Osem Food Indus., Ltd. v. Sherwood Foods, Inc., 917 F.2d 161 (4th Cir. 1990) 20

Park 'N Fly, Inc. v. Dollar Park & Fly, Inc., 469 U.S. 189 (1985) 23,25

Perfect Fit Indus., Inc. v. Acme Quilting Co., 618 F.2d 950 (2d Cir. 1980) 19

Piper Aircraft Corp. v. Wag-Aero, Inc., 741 F.2d 925 (7th Cir. 1984) 14

Pizzeria Uno Corp. v. Temple, 747 F.2d 1522 (4th Cir. 1984) 3,18

Polaroid Corp. v. Polaraid, Inc., 319 F.2d 830 (7th Cir. 1963) 18

Purolator, Inc. v. EFRA Distribs., Inc., 687 F.2d 554 (1st Cir. 1982) 19

Saxlehner v. Eisner & Mendelson Co., 179 U.S. 19 (1900) 23

Scandia Down Corp. v. Euroquilt, Inc., 772 F.2d 1423 (7th Cir. 1985), *cert. denied*, 475 U.S. 1147 (1986) 25

Schieffelin & Co. v. Jack Co. of Boca, Inc., 725 F. Supp. 1314 (S.D.N.Y. 1989) 26

Smith v. Transworld Drilling Co., 773 F.2d 610 (5th Cir. 1985) 8,9,11

Table of Authorities Continued

	Page
Snead v. New York Cent. R.R., 216 F.2d 169 (4th Cir. 1954)	9
Source Perrier, S.A. v. Waters of Saratoga Springs, Inc., 217 U.S.P.Q. 617 (S.D.N.Y. 1982)	22
Surdyk v. Indiana Harbor Belt, 148 F.2d 795 (7th Cir. 1945)	7
Syntex Lab., Inc. v. Norwich Pharmacal Co., 437 F.2d 566 (2d Cir. 1971)	14
Tackett v. Kidder, 616 F.2d 1050 (8th Cir. 1980)	8
Tetley, Inc. v. Topps Chewing Gum, Inc., 556 F. Supp. 785 (E.D.N.Y. 1983)	26
TVA v. Hill, 437 U.S. 153 (1978)	23
Two Pesos, Inc. v. Taco Cabana, Inc., 112 S. Ct. 2753 (1992)	25
United States Jaycees v. Philadelphia Jaycees, 639 F.2d 134 (3d Cir. 1981)	18,22,23
United States v. Draper, 762 F.2d 81 (10th Cir. 1985)	8,11
University of Georgia Athletic Ass'n v. Laite, 756 F.2d 1535 (11th Cir. 1985)	20
Volkswagenwerk A.G. v. Wheeler, 814 F.2d 812 (1st Cir. 1987)	14,22
Wadsworth v. Clindon, 846 F.2d 265 (4th Cir. 1988)	8
Weil v. Seltzer, 873 F.2d 1453 (D.C. Cir. 1989)	8,11
Wella Corp. v. California Concept Corp., 558 F.2d 1019 (C.C.P.A. 1977)	23
Wynn Oil Co. v. Thomas, 839 F.2d 1183 (6th Cir. 1988)	16

Constitutional Provisions and Statutes:

U.S. Const., Art. 1, § 8	1
15 U.S.C. § 1052 (1988)	12,23
15 U.S.C. § 1114 (1982)	2,17
15 U.S.C. § 1115 (1982)	2,22,23

Table of Authorities Continued

	Page
15 U.S.C. § 1125(a) (1982)	2
15 U.S.C. § 1127 (1988)	12
17 U.S.C. § 107 (1988)	26
28 U.S.C. § 1254(1) (1988)	1
Miscellaneous:	
A. Langvardt, *Protected Marks and Protected Speech: Establishing the First Amendment Boundaries in Trademark Parody Cases*, 36 Vill. L. Rev. 1 (1991)	29
C. Wright & A. Miller, *Federal Practice & Procedure* (1971)	6-7,11
Fed. R. Civ. P. 50	5,6
Fed. R. Civ. P. 59	6,10
H.R. Rep. No. 944, 76th Cong., 1st Sess. (1939)	13
J. McCarthy, *Trademarks and Unfair Competition*, (2d ed. 1984)	15,16,18,25-26
Note, *Trademark Parody: A Fair Use and First Amendment Analysis*, 72 Va. L. Rev. 1079 (1986)	29
Restatement (Third) of Unfair Competition (Tent. Draft No. 2, 1990)	10,13,14,15,18,20
S. Rep. No. 1333, 79th Cong., 2d Sess. (1946)	13,25

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioner, Anheuser-Busch, Inc., respectfully requests that a writ of certiorari issue to review the opinion of the United States Court of Appeals for the Fourth Circuit, entered in this proceeding on April 10, 1992.

Opinions Below

The Court of Appeals' opinion is reported at 962 F.2d 316, and is reproduced as Appendix A. The South Carolina District Court orally granted petitioner's motion for judgment notwithstanding the verdict, *see* Appendix B, the substance of which is set forth herein, and reserved ruling on petitioner's motion for a new trial. *See* Appendix C.

Jurisdiction

The judgment of the United States Court of Appeals for the Fourth Circuit was entered on April 10, 1992. That Court denied a timely petition for rehearing and suggestion for rehearing in banc by order dated May 8, 1992. *See* Appendix E, F. This petition is filed within ninety days of that date and, therefore, is timely. The jurisdiction of this Court to review the judgment of the Fourth Circuit is invoked pursuant to 28 U.S.C. § 1254(1) (1988).

Constitutional Provisions and Statutes Involved

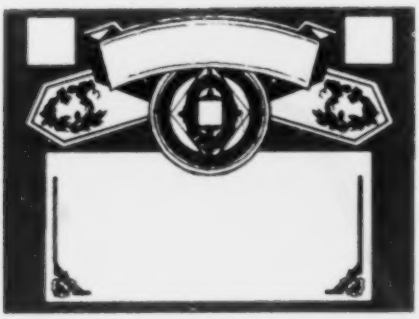
The United States Constitution, Article 1, section 8 provides in pertinent part:

> The Congress shall have power . . .
>
> To regulate commerce with foreign Nations, and among the several states and with the Indian Tribes.

Sections 32, 33, and 43(a) of the Lanham Act, codified at 15 U.S.C. §§ 1114, 1115, and 1125(a) (1982),[1] are reproduced in Appendix D.

Statement of the Case

Petitioner Anheuser-Busch, Incorporated ("plaintiff"), owns and uses on clothing the following trademark design, which is the subject of a federal registration (Reg. No. 1,372,700) for "clothing—namely T-shirts" (Appendix G):



Respondents ("defendants") admittedly copied onto their own T-shirt (*see* Appendix H) plaintiff's registered trademark, merely adding to plaintiff's design a geographic description ("Myrtle Beach") and other descriptive and subordinate words:

This Beach is for You!

[1] These Sections were revised by Pub. L. 100-667, Title I, §§ 127, 128 and 132, 102 Stat. 3935, 3943-46, codified at 15 U.S.C. §§ 1114, 1115 and 1125(a) (1988), effective November 16, 1989, after the September 11, 1989, filing date of this litigation.

In September 1989, plaintiff commenced this action in the South Carolina District Court against the producer (Venture Marketing) and a principal vendor (Wings) of the T-shirt, alleging infringement of Reg. No. 1,372,700 under the Lanham Act. On May 2, 1990, after a three day trial, the jury rendered a verdict for defendants. On May 17, 1990, plaintiff filed motions for judgment notwithstanding the verdict and, in the alternative and on additional grounds, for new trial. On February 28, 1991, **the trial judge took the new trial motion under advisement and granted plaintiff's motion for judgment notwithstanding the verdict, concluding that evidence of likelihood of confusion was "overwhelming" and "supports only one conclusion."**[2] In granting JNOV, the trial judge addressed the likelihood of confusion factors applied in all Circuits as enunciated by the Fourth Circuit in *Pizzeria Uno Corp. v. Temple*, 747 F.2d 1522 (4th Cir. 1984), and found that:

> 1. *Strength of Plaintiff's Mark*: Plaintiff's mark "is one of the **strongest marks in this country, indeed, in the world**";
>
> 2. *Similarity of Marks*: "The similarity of the marks is **overwhelmingly established** in the record." "The very purpose of the defendant was to create a similarity";
>
> 3. *Similarity of Goods*: **The goods "are identical"**;
>
> 4. *Similarity of Trade Outlets*: The "facilities the two parties use . . . are similar, probably **identical**";
>
> 5. *Similarity of Advertising*: "The similarity of the advertising . . . is **overwhelmingly established**";
>
> 6. *Defendants' Intent*: "There can be no question what the defendant's intent in this case was . . . . He copied the mark, **he copied it to confuse the public**"; and
>
> 7. *Evidence of Actual Confusion*: Defendant Wings' own professional buyer was confused.

---

[2] A. 438 (emphasis supplied). References are to the Joint Appendix filed in the Court of Appeals for the Fourth Circuit.

A. 438-40 (emphasis supplied).

On April 10, 1992, based on an analysis of words added to plaintiff's design mark, a majority of a Fourth Circuit Panel, Judges Wilkinson and Luttig, reversed the JNOV and, in a footnote, summarily denied plaintiff's new trial motion. Associate Justice (Retired) Powell, sitting by designation, dissented. Highlighting the sharp conflict between the majority's analysis and trademark law in other Circuits, Justice Powell observed (962 F.2d at 326):

> I know of no precedent that allows conclusive weight to be given to this factor [mark similarity] when a party has borrowed a distinctive mark, without making any discernable changes to it, and placed that mark on identical products marketed through identical commercial channels.

Reasons for Granting the Petition

The Fourth Circuit rendered a decision in conflict with decisions in other Circuits on the following issues:

1) *Unadjudicated New Trial Motions*: The Fourth Circuit refused to remand and instead peremptorily denied plaintiff's new trial motion, which the district court failed to conditionally adjudicate. All other Circuits remand such motions and the Fourth Circuit's procedure creates an unauthorized exception to the mandate of the Federal Rules and this Court's precedent;

2) *The Legal Test for Trademark Infringement*: The Fourth Circuit established a test for infringement limiting the statutory likelihood of confusion analysis to a side-by-side comparison of marks, ignoring factors evidencing the marks' marketplace impact, and rejecting the presumption of confusion from copying;

3) *The Statutory Rights of Registrants Under The Lanham Act*: The Fourth Circuit completely ignored the Lanham Act's statutory presumption that a registrant is afforded the "exclusive right to use" its mark on the goods covered by the registration, which is a right recognized

by other Circuits and one raising an important question of federal law that has not been, but should be, addressed by this Court; and

4) *The Judicial Creation of a Parody Defense*: The Fourth Circuit created a judicial parody defense to statutory trademark infringement, permitting defendants to avoid liability for an unauthorized, commercially competitive copy of a federally registered trademark merely by using the registered trademark with "humor and levity" rather than in a "contradictory" context required by the Lanham Act to avoid consumer deception and a likelihood of confusion.

I. THE FOURTH CIRCUIT'S PEREMPTORY DENIAL OF AND REFUSAL TO REMAND PLAINTIFF'S UNADJUDICATED NEW TRIAL MOTION CONFLICTS WITH THE FEDERAL RULES OF CIVIL PROCEDURE, PRECEDENT OF THIS COURT, AND DECISIONS IN OTHER CIRCUITS

Plaintiff moved both for JNOV and, on additional separate grounds, for a new trial. The new trial grounds included improper exclusion of plaintiff's expert survey showing overwhelming actual consumer confusion and the prejudicial admission of T-shirts bearing unauthorized versions of other famous trademarks, which defendants, without any foundation, represented to the jury as "examples of parodies." A. 360. The district court failed to rule on the new trial motion.[3] The Fourth Circuit, based solely on its reversal of the JNOV, summarily refused to remand for a ruling on the new trial motion, claiming that "no purpose" would be served because the "grounds for reinstating the jury verdict necessarily comprehend the es-

---

[3] The majority conceded that this failure to rule "contravened the express mandate of Rule 50 of the Federal Rules of Civil Procedure," 962 F.2d at 322-23 n.3. The Federal Rules explicitly provide that if a "motion for judgment notwithstanding the verdict . . . is granted, the court **shall** also rule on the motion for a new trial." Fed. R. Civ. P. 50(c)(1) (emphasis supplied).

sence of [plaintiff's] new trial motion." 962 F.2d at 322-23 n.3.

The structure of Federal Rules 50 and 59 governing JNOV and new trial motions "contemplates that either party to the action is **entitled to the trial judge's decision** on both motions, if both are presented." *Montgomery Ward & Co. v. Duncan*, 311 U.S. 243, 251 (1940) (emphasis supplied). Plaintiff is entitled to the trial court's ruling on its new trial motion, which likely would have been granted based on the trial judge's characterization of plaintiff's evidence as **"overwhelming."** However, the Fourth Circuit decision creates an exception cutting off that right. This Court should grant certiorari to review the Fourth Circuit's failure to remand--a procedure that deprived plaintiff of its right to the district court's ruling on the new trial motion in conflict with Rules 50 and 59, this Court's precedent, and decisions in other Circuits.

A. The Fourth Circuit's Refusal to Remand Plaintiff's New Trial Motion Conflicts With This Court's Precedent and Decisions in Other Circuits

In *Montgomery Ward & Co. v. Duncan*,[4] this Court confirmed that "the party against whom the verdict went is entitled to have his motion for a new trial considered in respect of asserted substantial trial errors and matters appealing to the discretion of the judge" and that failure to rule could be "cured without depriving the defendant of opportunity to have its motion for a new trial heard." 311 U.S. at 251-52, 255. Accordingly, the Court ordered the case "remanded to the District Court to hear and rule upon [the new trial] motion." *Id.* at 255. *See* 9 C. Wright & A. Miller, *Federal Practice & Procedure*, § 2539, at 610

---

[4] In *Montgomery Ward*, the defendant moved for JNOV, and in the alternative for new trial. The trial court granted JNOV without ruling on the new trial motion. The Court of Appeals reversed the JNOV, directed the district court to enter judgment for plaintiff, and "overrul[led] the defendant's contention that the case should be remanded with leave to the trial court to dispose of the motion for a new trial." 311 U.S. at 247.

(1971) (appellate court "**must remand**" for ruling on new trial motion). No other rule complies with the Federal Rules because "[t]he authority to grant a new trial . . . is confided almost entirely to the exercise of discretion of the . . . trial court." *Allied Chem. Corp. v. Daiflon, Inc.*, 449 U.S. 33, 36 (1980). *Accord Fairmont Glass Works v. Cub Fork Coal Co.*, 287 U.S. 474, 482 (1933).

Following *Montgomery Ward*, all Circuits considering the issue, except the Fourth, remand any undecided new trial motion.[5] Thus, in *Nodak Oil Co. v. Mobil Oil Corp.*, 526 F.2d 798 (8th Cir. 1975), the Eighth Circuit remanded an unadjudicated new trial motion before considering the JNOV appeal, declaring remand necessary to effectuate the "'**inflexible command**' to rule conditionally on the new trial motion[, which] is a codification of the principles established by the Supreme Court in *Montgomery Ward*." (emphasis supplied). The Fourth Circuit's "no purpose" exception to the clear requirement of remand deprives plaintiff of its right to have the new trial motion decided by the district court and directly conflicts with the procedure in other Circuits.

---

[5] *See Lowe v. Conlee*, 742 F.2d 1140, 1141 (8th Cir. 1984); *Gordon Mailloux Enters., Inc. v. Firemen's Ins. Co.*, 366 F.2d 740, 742 (9th Cir. 1966) (reversing JNOV and remanding because "the trial court must now act upon the undisposed-of [new trial] motion"); *Casper v. Barber & Ross Co.*, 288 F.2d 379, 385 (D.C. Cir. 1961) (Miller, J., concurring in part, dissenting in part) ("Of course, the majority, having reversed [JNOV], were bound to remand for a ruling on the motion for a new trial"); *Magee v. General Motors Corp.*, 213 F.2d 899, 900 (3d Cir. 1954) (failure to rule is "an abdication of the judge's functions with respect to [a new trial] motion," and "[t]he case *must*, therefore, go back to the district court for reconsideration of the motion for a new trial in the light of the court's view of the weight of the evidence and all other relevant factors"); *Surdyk v. Indiana Harbor Belt*, 148 F.2d 795, 798 (7th Cir. 1945) ("[S]ince motions for new trial are addressed to the nisi prius court, the cause must be remanded to the District Court."). *See also Clements v. General Accident Ins. Co.*, 821 F.2d 489, 493 (8th Cir. 1987); *Minthorne v. Seeburg Corp.*, 397 F.2d 237, 245 (9th Cir. 1968), *cert. denied*, 397 U.S. 1036 (1970); *Atkins v. Halliburton Oil Well Cementing Co.*, 196 F.2d 876, 879 (5th Cir. 1952).

B. The Requirement to Remand Unadjudicated New Trial Motions Is Unequivocal and Based on Sound Jurisprudence

The clear, consistent voice of this Court and the other Circuits mandating remand of unadjudicated new trial motions constitutes sound policy recognizing (1) the very different standards for granting JNOV and new trial motions, and the concomitantly different appellate standards of review[6]; (2) the different issues addressed by JNOV and new trial motions, including the trial court's broad discretion to grant, even *sua sponte*, a new trial for reasons not apparent to an appellate court; and (3) the trial court's broad discretion on new trial motions.[7]

The Fourth Circuit's "no purpose" test confuses the standards for JNOV and new trial motions. Unquestionably, "the motion for judgment notwithstanding the verdict

---

[6] "A motion for a new trial is addressed to the sound discretion of the trial court, and its action thereon will not be disturbed on appeal unless such an action constitutes a manifest abuse of discretion." *Wadsworth v. Clindon*, 846 F.2d 265, 266 (4th Cir. 1988). *Accord Murphy v. City of Long Beach*, 914 F.2d 183, 186 (9th Cir. 1990); *Weil v. Seltzer*, 873 F.2d 1453, 1457 (D.C. Cir. 1989); *Smith v. Transworld Drilling Co.*, 773 F.2d 610, 613 (5th Cir. 1985); *United States v. Draper*, 762 F.2d 81, 83 (10th Cir. 1985).

[7] The majority cited no sound precedent or policy for its refusal to remand. In *Mays v. Pioneer Lumber Corp.*, 502 F.2d 106, 110 (4th Cir. 1974), *cert. denied*, 420 U.S. 927 (1975), the only case cited, the court refused to remand because the movant's "only ground for a new trial was the same as that advanced for judgment n.o.v." Moreover, two trials had taken place, and the court concluded that "two trials are enough." *See also Tackett v. Kidder*, 616 F.2d 1050 (8th Cir. 1980) (citing *Mays* with approval in dicta). These purported justifications for departure from the requirement to remand are not applicable here. Moreover, judicial economy does not justify allowing an "injustice" because of the district court's oversight. *See Casper v. Barber & Ross Co.*, 288 F.2d at 384-85. The Fourth Circuit also asserted that appellate dismissal of unadjudicated new trial motions prevents "protracted litigation." 962 F.2d at 322 n.3. However, an appellate court could (and should) avoid separate appeals simply by remanding for a ruling on the new trial motion **before** considering the JNOV appeal. *See Nodak Oil Co. v. Mobil Oil Corp.*, 526 F.2d 798.

and the motion for a new trial have different and peculiar offices," *Casper v. Barber & Ross Co.*, 288 F.2d at 383, and "the mental process in deciding a motion to direct a verdict is very different from that used in deciding a motion to set aside a verdict as against the weight of evidence." *Felton v. Spiro*, 78 F. 576, 582 (6th Cir. 1897).[8] On a JNOV motion, the trial court and reviewing appellate court search for "substantial" evidence and view all evidence in a light favorable to the non-moving party without credibility determinations. In contrast, the "clear weight" standard for a new trial does not require inferences in favor of the non-movant, and "a trial court may weigh the evidence and consider the credibility of witnesses." *Gill v. Rollins Protective Servs. Co.*, 836 F.2d 194, 196 (4th Cir. 1987).[9] The difference between these two standards permits trial judges to grant new trials for reasons that would not support JNOV.[10]

---

[8] The test for granting a new trial is much broader than the JNOV standard and asks whether "the verdict is against the weight of the evidence . . . or that, for other reasons, the trial was not fair to the party moving." *Montgomery Ward & Co. v. Duncan*, 311 U.S. at 251. *Accord Snead v. New York Cent. R.R.*, 216 F.2d 169, 172 (4th Cir. 1954).

[9] In this case, credibility is crucial. The Fourth Circuit, in its JNOV discussion, made a factual "finding" contrary to the district court's finding regarding defendants' intent, which by itself would warrant a new trial. The majority emphasized that defendants' designer "testified that his intent in creating the T-shirt design was to parody the Budweiser beer label." 962 F.2d at 320. The majority's refusal to remand strips the discretion from **the trial judge, who, having seen the designer on the stand, concluded "[t]his was an intentional infringement.** [T]here can be no question what the defendant's intent in this case was . . . . **He copied the mark . . . to confuse the public.**" A. 439-40 (emphasis supplied).

[10] *See, e.g., Smith v. Transworld Drilling Co.*, 773 F.2d at 613; *Aetna Casualty & Sur. Co. v. Yeatts*, 122 F.2d 350, 352-53 (4th Cir. 1941) ("It is the duty of the judge to set aside the verdict and grant a new trial, if he is of the opinion that the verdict is against the clear weight of the evidence . . . even though there may be substantial evidence which would prevent the direction of a verdict.").

The trial judge found the evidence in plaintiff's favor "overwhelming,"[11] even when assessed by a restrictive JNOV standard. No one seriously can believe this view of the evidence would be any less conclusive with inferences drawn in plaintiff's favor. In fact, when the Fourth Circuit majority acknowledged that "[w]e cannot say that the jury's [verdict] was the only one it could have reached," 962 F.2d at 319, it conceded that it could not have reversed under the deferential abuse of discretion standard if the district court granted plaintiff's new trial motion.

The Fourth Circuit's underlying premise, that appellate review of the grounds for JNOV will "necessarily comprehend" all the reasons for new trial, is simply wrong. The trial court's unique ability to assess all grounds for new trial "is illustrated by the court's *sua sponte* power to grant a new trial on grounds not alleged by a party." *Murphy v. City of Long Beach*, 914 F.2d at 187. *See also* Fed. R. Civ. P. 59(d). In this case, the trial court unquestionably would be authorized to grant a new trial based on a change of its ruling excluding plaintiff's confusion survey. That survey, showing a staggering 50% of respondents identifying plaintiff (or Budweiser) as authorizing defendants' T-shirts, was compelling evidence of likelihood of confusion.[12] Independently, the trial court could

---

[11] *See Marsh v. Illinois Cent. Rail Co.*, 175 F.2d 498, 500 (5th Cir. 1944) (remanding new trial motion evaluated under improper standard, and indicating it should be granted if the district court continued to believe "the verdict to be against the overwhelming weight of the evidence"); *Gates v. L.G. DeWitt, Inc.*, 528 F.2d 405, 410 (5th Cir. 1976); *Hampton v. Magnolia Towing Co.*, 338 F.2d 303 (5th Cir. 1964).

[12] "Courts have given weight to survey results showing confusion among 25% or more of those surveyed even when the survey was partially flawed. Similarly, surveys without obvious defects detecting confusion of 7% to 15% of the sample have been held adequate, when supported by other evidence, to prove a likelihood of confusion." Restatement (Third) of Unfair Competition (Tent. Draft No. 2, 1990) § 20, comment g, at 176. Plaintiff's survey was excluded on the ground that likelihood of confusion is not an appropriate subject for expert testimony. In fact, such surveys have been consistently accepted by courts. The court also expressed concern about the survey's timing and defendants' ability to respond, which could be alleviated by a new trial.

have granted a new trial based on the highly prejudicial admission of alleged "examples of parody" of other trademarks,[13] which even with limiting instructions gave the jury an improper message about the propriety of unauthorized trademark use. Having ignored both grounds, the Fourth Circuit's conclusion that its grounds for reversing JNOV "necessarily comprehend" the new trial grounds is insupportable.

Finally, the majority's holding frustrates the discretion vested with the trial court on new trial motions. "The authority to grant a new trial . . . is confided almost entirely to the exercise of discretion of the . . . trial court," *Allied Chem. Corp. v. Daiflon, Inc.*, 449 U.S. at 36, and the "trial judge is not required to enter supporting findings of facts and conclusions of law when granting a new trial motion." *Id.* at 36 n.3. *See also Montgomery Ward & Co. v. Duncan*, 311 U.S. at 249. This broad discretion to decide new trial motions reflects the trial court's unique position "to view the proceeding in a perspective peculiarly available to him alone," *Cone v. West Virginia Pulp & Paper Co.*, 330 U.S. 212, 216 (1947), which an appellate court cannot, and should not, attempt to usurp.[14]

---

[13] Defendants' shirt exhibits included unauthorized uses of the well-known BMW, ABSOLUT, and HARD ROCK CAFE marks. None of these uses have been found to be "parody" or non-infringing by any trier of fact, and similar shirts have been found to be infringements. *See Hard Rock Cafe Licensing Corp. v. Pacific Graphics, Inc.*, 776 F. Supp. 1454 (W.D. Wash. 1991) (alleged parody confusingly similar).

[14] In *Cone*, this Court cautioned that an appellate court addressing a new trial ruling must give substantial deference to the decision of a trial judge, "who saw and heard the witnesses and has the feel of the case which no appellate printed transcript can impart." 330 U.S. at 216. *See Smith v. Transworld Drilling Co.*, 773 F.2d at 613; *Weil v. Seltzer*, 873 F.2d at 1457; *United States v. Draper*, 762 F.2d at 83. *See generally* 11 C. Wright & A. Miller, *supra*, § 2818, at 119-120.

II. THE FOURTH CIRCUIT'S DECISION IS IN IRRECONCILABLE CONFLICT WITH DECISIONS IN ALL OTHER CIRCUITS AND WITH THE LANHAM ACT ON THE ISSUES OF THE LEGAL TEST FOR INFRINGEMENT, THE STATUTORY RIGHTS OF REGISTRANTS, AND THE DEFENSE OF PARODY

This case poses the question of whether an admitted copy of a famous, federally registered design trademark,[15] using the entire mark in competition with the trademark owner and adding merely descriptive matter claimed to be parody, constitutes infringement under the Lanham Act. The district court granted plaintiff's JNOV motion, recognizing such copying as infringement as a matter of law and illustrating Justice Frankfurter's observation that:

> The protection of trade-marks is the law's recognition of the psychological function of symbols. If it is true that we live by symbols, it is no less true that we purchase goods by them. A trade-mark is a merchandising short-cut which induces a purchaser to select what he wants, or what he has been lead to believe he wants. The owner of a mark exploits this human propensity by making every effort to impregnate the atmosphere of the market with the drawing power of a congenial symbol. Whatever the means employed, the aim is the same—to convey through the mark, in the minds of potential customers, the desirability of the commodity upon which it appears. Once this is attained, the trademark owner has something of value. **If another poaches upon the commercial magnetism of the symbol he has created, the owner can obtain legal redress.**

Mishawaka Rubber & Woolen Mfg. Co. v. S.S. Kresge Co., 316 U.S. 203, 205 (1942) (emphasis supplied). The district

---

[15] A registered trademark is a mark "by which the goods of the [registrant] may be distinguished from the goods of others." 15 U.S.C. § 1052 (1988). "The term 'trademark' includes any word, name, symbol, or device, or any combination thereof . . . ." *Id.* § 1127.

court's decision was consistent with this Court's pronouncement that:

> Such blatant trademark infringement inhibits competition and subverts both goals of the Lanham Act. By applying a trademark to goods produced by one other than the trademark's owner, the infringer deprives the owner of the goodwill which he spent energy, time, and money to obtain. *See* S. Rep. No. 1333, 79th Cong., 2d Sess., 3 (1946). At the same time, the infringer deprives consumers of their ability to distinguish among the goods of competing manufacturers. *See* H.R. Rep. No. 944, 76th Cong., 1st Sess., 3 (1939).

Inwood Lab., Inc. v. Ives Lab., Inc., 456 U.S. 844, 854 n.14 (1982). In reversing the JNOV, the Fourth Circuit cast aside controlling statutory language and precedent.

A. The Fourth Circuit's "Intrinsic Similarity" Test for Trademark Infringement Ignores Marketplace Factors Evidencing Infringement as a Matter of Law, and Conflicts with Precedent of Other Circuits and the Lanham Act

Every Circuit uses a set of factors replicating the marketplace[16] to enforce the Lanham Act's prohibition of marks "likely to cause confusion."[17] The setting in which a mark is used controls its appearance and the impression

---

[16] *See* Restatement (Third) of Unfair Competition, *supra*, § 21, reporters' note, at 201. The enumeration varies, but a consensus exists among the Circuits on certain market criteria. *See Boston Athletic Ass'n v. Sullivan*, 867 F.2d 22, 29 (1st Cir. 1989); *Carl Zeiss Stiftung v. VEB Carl Zeiss Jena*, 433 F.2d 686, 704 (2d Cir. 1970), *cert. denied*, 403 U.S. 905 (1971); *Interpace Corp. v. Lapp, Inc.*, 721 F.2d 460, 463 (3d Cir. 1983); *Fuji Photo Film Co. v. Shinohara Shoji Kabushiki Kaisha*, 754 F.2d 591, 595 (5th Cir. 1985); *Frisch's Restaurants, Inc. v. Elby's Big Boy, Inc.*, 670 F.2d 642, 649 (6th Cir.), *cert. denied*, 459 U.S. 916 (1982); *Helene Curtis Indus., Inc. v. Church & Dwight Co.*, 560 F.2d 1325, 1331 (7th Cir. 1977), *cert. denied*, 434 U.S. 1070 (1978); *Mutual of Omaha Ins. Co. v. Novak*, 836 F.2d 397, 399 (8th Cir. 1987), *cert. denied*, 488 U.S. 933 (1988); *AMF, Inc. v. Sleekcraft Boats*, 599 F.2d

it conveys to prospective purchasers. Thus, **in all Circuits,** "[t]he test for likelihood of confusion does not focus on similarity of competing marks in the abstract. Rather the test evaluates objective evidence that the competing marks, when used in the marketplace, are likely to confuse the purchasing public." *Kenner Parker Toys, Inc. v. Rose Art Indus., Inc.*, 963 F.2d 350, 352 (Fed. Cir. 1992).[18] Because "these factors are interrelated and must be considered as such in assessing likelihood of confusion," *Beer Nuts, Inc. v. Clover Club Foods Co.*, 805 F.2d at 925, any appropriate infringement analysis **must** consider "all the circumstances of the marketing of the respective goods." Restatement (Third) of Unfair Competition, *supra*, § 21, cmt. a, at 188.

The Fourth Circuit nevertheless framed the Lanham Act issue in terms of a threshold test of "intrinsic similarity," dismissing the statutorily-based market factors as "extrinsic." 962 F.2d at 320. The Fourth Circuit held that "absent

---

341, 348 (9th Cir. 1979); *Beer Nuts, Inc. v. Clover Club Foods Co.*, 805 F.2d 920, 925 (10th Cir. 1986); *Dieter v. B&H Indus., Inc.*, 880 F.2d 322, 326 (11th Cir. 1989), *cert. denied*, 111 S. Ct. 369 (1990); *In re E.I. DuPont de Nemours & Co.*, 476 F.2d 1357, 1361 (C.C.P.A. 1973).

[17] "Likelihood of confusion" may arise not only as to the origin or source of the goods, but also as to whether the owner of the mark licenses, sponsors, endorses, authorizes or is otherwise connected or affiliated with defendants' product. *See, e.g., Boston Athletic Ass'n v. Sullivan*, 867 F.2d at 28-29. The object of this confusion may be "plaintiff's customers, defendant's customers and other members of the public." *AMP, Inc. v. Foy*, 540 F.2d 1181, 1183 (4th Cir. 1976). *See also Syntex Lab., Inc. v. Norwich Pharmacal Co.*, 437 F.2d 566, 568 (2d Cir. 1971).

[18] *See also Mutual of Omaha Ins. Co. v. Novak*, 836 F.2d at 399 n.4; *Volkswagenwerk A.G. v. Wheeler*, 814 F.2d 812, 817 (1st Cir. 1987); *Beer Nuts, Inc. v. Clover Club Foods Co.*, 805 F.2d at 925; *Piper Aircraft Corp. v. Wag-Aero, Inc.*, 741 F.2d 925, 934 (7th Cir. 1984); *Chevron Chem. Co. v. Voluntary Purchasing Groups, Inc.*, 659 F.2d 695, 704 (5th Cir. Unit A 1981), *cert. denied*, 457 U.S. 1126 (1982); *Harold F. Ritchie, Inc. v. Chesebrough-Pond's, Inc.*, 281 F.2d 755, 760 (2d Cir. 1960). The majority acknowledged, but then ignored, the requirement that it "must examine the allegedly infringing use in the context in which it is seen by the ordinary consumer." 962 F.2d at 319.

some threshold of intrinsic similarity between the plaintiff's trademark and the defendant's alleged infringement," consideration of "extrinsic factors" such as the strength of the plaintiff's mark and similarity of products, sales outlets, and advertising is "unnecessary." *Id.*

The Lanham Act standard of infringement is not degree of similarity, but "likelihood of confusion," and the issue is not, as the majority posed it, whether an observer would find differences between the marks in isolation. In this case, counsel conceded not only the strength of plaintiff's design mark and the similarity of marks, but also similarity of goods, outlets, and advertising.[19] The majority's "intrinsic similarity" test fails to recognize that, **based on defendants' concessions of market proximity,** "the degree of similarity of marks needed to cause confusion is less than in the case of dissimilar goods." 2 J. McCarthy, *Trademarks and Unfair Competition,* § 24:6, at 181 (2d ed. 1984), and, as a corollary, **the degree of dissimilarity of marks necessary to avoid a finding of likelihood of confusion increases.** Restatement (Third) of Unfair Competition, *supra,* § 21, cmt. g, at 195-96. By disregarding, as "extrinsic" and "unnecessary," market factors essential to defining confusing similarity, the Fourth Circuit reduced the statutorily mandated likelihood of confusion analysis to an abstract comparison condemned by precedent and treatise alike. When the conceded factors that the majority ignored, including the fame of plaintiff's mark and defendants' intentional copying, are properly included in the analysis, the propriety of JNOV becomes evident.

---

[19] A. 408. Venture Marketing's counsel acknowledged that "this case was not defended on the contention that . . . the designs were not similar" (A. 403) and that: "If I might address the Pizzeria Uno case. There are seven factors, and the first five [including design similarity] **we do concede, there is simply no good faith argument otherwise.**" A. 433 (emphasis supplied). *See* 962 F.2d at 326 n.5.

1. The Fourth Circuit Reached Its Aberrant Result by Engaging in a Universally Condemned Side-by-Side Analysis

The majority's infringement test began (and essentially ended) with a side-by-side analysis of descriptive **words** simply **added to** plaintiff's **design-only** trademark, even though other Circuits uniformly recognize that a "[s]ide-by-side comparison is not the test" of likelihood of confusion. *James Burrough, Ltd. v. Sign of Beefeater, Inc.*, 540 F.2d 266, 275 (7th Cir. 1976).[20]

The jury certainly had, as the court noted, a three-day "opportunity to visually examine the T-shirt and to compare it with the Anheuser-Busch trademarks," 962 F.2d at 319, but the question is not whether a jury, by careful, out-of-context examination, eventually might conclude that the parties were not related.

> A court should not indulge in a prolonged and minute comparison of the conflicting marks in the peace and quiet of judicial chambers, for this is not the context in which purchasers are faced with the marks. As one court stated, "Purchases of merchandise are not made in a vacuum with Professor Quiz in charge."

2 J. McCarthy, *supra*, § 23:17, at 96. Indeed, the Fourth Circuit's test offers no protection whatsoever for "prospective purchasers who carry even an imperfect recollection of [plaintiff's] mark and who observe [defendants']

---

[20] *See, e.g., Mutual of Omaha Ins. Co. v. Novak*, 836 F.2d at 399 n.4; *Wynn Oil Co. v. Thomas*, 839 F.2d 1183, 1187 (6th Cir. 1988); *Beer Nuts, Inc. v. Clover Club Foods Co.*, 805 F.2d at 926; *John H. Harland Co. v. Clarke Checks, Inc.*, 711 F.2d 966, 975 (11th Cir. 1983); *Chevron Chem. Co. v. Voluntary Purchasing Groups, Inc.*, 659 F.2d at 704; *Levi Strauss & Co. v. Blue Bell, Inc.*, 632 F.2d 817, 822 (9th Cir. 1980); *Fleischmann Distilling Corp. v. Maier Brewing Co.*, 314 F.2d 149, 161 (9th Cir.), *cert. denied*, 374 U.S. 830 (1963); *Harold F. Ritchie, Inc. v. Chesebrough-Pond's, Inc.*, 281 F.2d at 762.

label after the point of sale." *Levi Strauss & Co. v. Blue Bell, Inc.*, 632 F.2d at 822.[21]

The majority compounded its error by carrying out its side-by-side examination in conflict with the Lanham Act, which asks if defendants' mark "is likely to cause confusion" with the *registered mark*. 15 U.S.C. § 1114(1). Plaintiff alleged infringement of its federal design registration for T-shirts, which contains no words of any kind. However, the Fourth Circuit ignored plaintiff's design registration and carried out its erroneous side-by-side comparison of a Budweiser beer can and defendants' T-shirt design. The fallacy of the majority's side-by-side comparison is revealed in the following comparison:

Fourth Circuit's Three "Conspicuous Differences"	**Plaintiff's Design Mark Reg. No. 1,372,700**
Defendants' "T-shirt design makes no reference of any sort to Anheuser-Busch or Budweiser"	Registered trademark makes no reference of any sort to Anheuser-Busch or Budweiser
The T-shirt design "replaces the Budweiser label's descriptions of the beer with analogous language descriptive of the beach"	Registered trademark has no references to Budweiser or descriptions of beer whatsoever
The T-shirt design "incorporates its own beach slogans in place of the Budweiser beer slogan"	Registered trademark has no "Budweiser beer slogan"

Justice Powell recognized what the majority ignored: plaintiff's design, Reg. No. 1,372,700, is "a separately reg-

---

[21] Particularly is this true with T-shirts which are "hastily bought," *Boston Athletic Ass'n v. Sullivan*, 867 F.2d at 30,—as "Lord MacNaughten put it in a case involving misappropriation of a name for ale: 'Thirsty folk want beer, not explanations.'" *American Auto. Ins. Co. v. American Auto Club*, 184 F.2d 407, 409 (9th Cir. 1950).

istered trademark" entitled to protection as an independent identifier of source. 962 F.2d at 325 n.2.

2. The Fourth Circuit Wholly Ignored the Legal Effect of the Admitted Fame and Resulting Strength of Plaintiff's Design Trademark

Justice Powell's dissent, consistent with defendants' concession regarding the strength of plaintiff's mark, observed:

> Few can disclaim familiarity with the Budweiser label design. It has been used by Anheuser-Busch as a trademark on beer cans since 1876 and on clothing since 1967. It has been the subject of extensive advertising. And it has been used to market several thousand products, including T-shirts sold in seaside stores. In short, it is, as the district court observed, "one of the strongest marks in this country, indeed in the world."

962 F.2d at 325. The Fourth Circuit ignored this unique strength, and its characterization of trademark strength as "extrinsic," *id.* at 320, and "unnecessary" in considering "intrinsic similarity," conflicts with decisions in virtually every Circuit.[22] Indeed, within days of the Fourth Circuit decision, the Federal Circuit held that the "fame of [a] mark plays a dominant role in cases featuring a

---

[22] *See Boston Athletic Ass'n v. Sullivan*, 867 F.2d at 32; *Mobil Oil Corp. v. Pegasus Petroleum Corp.*, 818 F.2d 254, 258 (2d Cir. 1987); *United States Jaycees v. Philadelphia Jaycees*, 639 F.2d 134, 143 (3d Cir. 1981); *Ameritech, Inc. v. American Info. Technologies Corp.*, 811 F.2d 960, 966 (6th Cir. 1987); *Polaroid Corp. v. Polaraid, Inc.*, 319 F.2d 830, 837 (7th Cir. 1963); *Levi Strauss & Co. v. Blue Bell, Inc.*, 632 F.2d at 820; *John H. Harland Co. v. Clarke Checks, Inc.*, 711 F.2d at 973. Even in the Fourth Circuit, prior to the majority's decision in this case, the strength of the mark was the "paramount factor." *Pizzeria Uno Corp. v. Temple*, 747 F.2d at 1527. *See generally* Restatement (Third) of Unfair Competition, *supra*, § 21, cmt. i, at 196; 1 J. McCarthy, *supra*, § 11:24, at 503 ("'Strong marks' are given 'strong' protection—protection over a wide range of related products and services and variations on visual and aural format.").

strong mark." *Kenner Parker Toys, Inc. v. Rose Art Indus., Inc.*, 963 F.2d at 352.

In the *marketplace*, "a mark that is strong because of its fame or uniqueness, is more likely to be remembered and is more likely to be associated in the public mind with a greater breadth of products." *James Burrough, Ltd. v. Sign of Beefeater, Inc.*, 540 F.2d at 276. Thus, as a matter of law, "as a mark's fame increases, the [Lanham] Act's tolerance for similarities in competing marks falls." *Kenner Parker Toys, Inc. v. Rose Art Indus., Inc.*, 963 F.2d at 353. Plaintiff's registered design trademark, like the McDonald's golden arches, the Rolls-Royce Flying Lady, and other famous symbols, thus merits "the most protection the Lanham Act can provide." *Mobil Oil Corp. v. Pegasus Petroleum Corp.*, 818 F.2d at 257.

By treating the fame of a mark as "extrinsic," the Fourth Circuit's holding threatens the fundamental purposes of trademark law, which include preventing consumer deception and encouraging investment in distinctive marks. "These manifold purposes and benefits of the Lanham Act only operate, however, if investments to secure a strong, recognizable mark bring the reward of certain legal protection." *Kenner Parker Toys, Inc. v. Rose Art Indus., Inc.*, 963 F.2d at 354.

3. The Fourth Circuit's Decision That Intentional Copying Does Not Raise a Presumption of Likelihood of Confusion Conflicts with Decisions in Other Circuits

In other Circuits, intentional copying of a mark, standing alone, justifies an inference of confusing similarity, even without an intent to confuse.[23] In the *marketplace*,

---

[23] *See Purolator, Inc. v. EFRA Distribs., Inc.*, 687 F.2d 554, 561 (1st Cir. 1982); *Chevron Chem. Co. v. Voluntary Purchasing Groups, Inc.*, 659 F.2d at 704; *Perfect Fit Indus., Inc. v. Acme Quilting Co.*, 618 F.2d 950, 954 (2d Cir. 1980); *HMH Publishing Co. v. Brincat*, 504 F.2d 713, 720 (9th Cir. 1974); *American Chicle Co. v. Topps Chewing Gum, Inc.*, 208 F.2d 560, 563 (2d Cir. 1953); *My-T Fine Corp. v. Samuels*,

intentional copying creates "an unmistakable aura of deception," *Boston Athletic Ass'n v. Sullivan*, 867 F.2d at 34-35,[24] and a requirement that the appropriator take steps to distinguish its design as part of "an affirmative duty to avoid the likelihood of confusion." *Id.* at 29. Nonetheless, the majority "jettison[ed] this presumption in the parody context" over Justice Powell's dissent:

> [The majority] suggests that an exception to the presumption should apply when a defendant asserts that he intended to parody a particular trademark. I am not persuaded that such an exception is applicable here. It is true that parody requires a degree of imitation. But the burden of disproving infringement should rest on one who intentionally uses another's trademark—even as parody. If the parody is strong, the burden will be light. If it is not, then a heavy burden is appropriate since the junior user is likely to benefit from its continuing affiliation with the "drawing power" of the senior user's mark.

962 F.2d at 326.

Because, with insignificant variations, commercial pirates always could assert "parody" for their exploitative efforts, the presumption of confusion arising from intentional copying should not evaporate when parody is raised in a commercial context.[25] Defendants admittedly relied on

---

69 F.2d 76, 77 (2d Cir. 1934); *Aetna Casualty & Sur. Co. v. Aetna Auto Fin., Inc.*, 123 F.2d 582, 584 (5th Cir. 1941), *cert. denied*, 315 U.S. 824 (1942). Prior to the majority's decision, this also was the rule in the Fourth Circuit. *See Osem Food Indus., Ltd. v. Sherwood Foods, Inc.*, 917 F.2d 161, 165 (4th Cir. 1990).

[24] *Accord University of Georgia Athletic Ass'n v. Laite*, 756 F.2d 1535, 1546 (11th Cir. 1985); *Baker v. Simmons Co.*, 307 F.2d 458, 465 (1st Cir.1962).

[25] The Restatement (Third) of Unfair Competition, *supra*, § 22, **treats intent as sufficient in itself,** apart from "Market Factors" considered in § 21, to establish likelihood of confusion. According to the Restatement, "[e]ven if the actor's intentional copying of another's designation is in good faith . . . , the actor remains under an obligation to take reasonable steps to avoid confusion." § 22, reporter's note, at 215.

the "commercial magnetism" of plaintiff's "congenial symbol" to promote their T-shirts among consumers,[26] and to act as "the triggering mechanism for the sale." *Boston Professional Hockey Ass'n v. Dallas Cap & Emblem Mfg., Inc.*, 510 F.2d 1004, 1012 (5th Cir.), *cert. denied*, 423 U.S. 868 (1975). As a result, the Fourth Circuit's decision undermines the Lanham Act's goal of preventing consumer deception, and this Court should grant certiorari to resolve the split in the Circuits regarding the presumption arising from copying, and the important issue of whether a claim of "parody" cancels that presumption.

B. The Fourth Circuit, by Ignoring the Statutory Significance of Plaintiff's Registration, Which Constitutes Prima Facie Evidence of the Exclusive Right to Use the Mark, and by Allowing Descriptive Matter to Assume Decisive Significance, Conflicts with the Lanham Act and Decisions in Other Circuits

The Fourth Circuit majority's "intrinsic similarity" test completely ignored plaintiff's federal registration for "clothing, namely, T-shirts." However,

> Under [Section 33(a) of the Lanham] Act, registration is prima facie evidence of the registrant's ownership of the mark and of the registrant's exclusive right to use the mark in commerce in connection with the services specified in the registration certificate. Thus registration is sufficient to establish **prima facie** (1) the required prior use (2) of a registrable mark (3) which is **likely to be confused with another's use of the same or a similar mark.**

---

[26] Venture Marketing **admitted** that its purpose in using the "Budweiser format" was to attract people to look at the T-shirt. A. 138, 143. Wings' president **admitted** that "this shirt appealed to the customer, because it looked like a can of beer, and it does make resemblance to Anheuser-Busch or Budweiser beer." A. 206.

American Heritage Life Ins. Co. v. Heritage Life Ins. Co., 494 F.2d 3, 10 (5th Cir. 1974) (emphasis supplied).[27] Simply put, "'[e]xclusive right to use' means the **right to exclude others from using the registered mark.**" *James Burrough, Ltd. v. Sign of Beefeater, Inc.*, 540 F.2d at 273 n.15. Registration thus "shift[s] the burden of proof from the plaintiff, who in a common law infringement action would have to establish his right to exclusive use, to the defendant, who must introduce sufficient evidence to rebut the presumption of plaintiff's right to such [exclusive] use." *Keebler Co. v. Rovira Biscuit Corp.*, 624 F.2d 366, 373 (1st Cir. 1980). Under the plain wording of the Lanham Act, plaintiff had "an exclusive right to use the mark" for T-shirts,[28] which, based on defendants' copying of the exact mark for the exact goods, "establishes a rebuttable presumption of likely confusion." *DeCosta v. Viacom Int'l, Inc.*, 758 F. Supp. at 814.

The significance of plaintiff's prima facie right to exclusive use in this case lies in its relationship to the well-recognized rule "that **one may not appropriate the entire mark of another and avoid a likelihood of confusion by the addition thereto of descriptive or otherwise subordinate matter.**" *Bellbrook Dairies, Inc. v. Hawthorn-Mellody Farms Dairy, Inc.*, 253 F.2d 431, 432 (C.C.P.A.

---

[27] *Accord Volkswagenwerk A.G. v. Wheeler*, 814 F.2d at 819, 820; *United States Jaycees v. Philadelphia Jaycees*, 639 F.2d at 143; *DeCosta v. Viacom Int'l, Inc.*, 758 F. Supp. 807, 814 (D.R.I. 1991); *Source Perrier, S.A. v. Waters of Saratoga Springs, Inc.*, 217 U.S.P.Q. 617, 619 (S.D.N.Y. 1982); *Coit Drapery Cleaners, Inc. v. Coit Drapery Cleaners of N.Y., Inc.*, 423 F. Supp. 975, 978 (E.D.N.Y. 1976).

[28] *United States Jaycees v. Philadelphia Jaycees*, 639 F.2d at 143. The registration is now incontestable, a fact of which the Court can take judicial notice. *See, e.g., Barr Rubber Prods. Co. v. Sun Rubber Co.*, 425 F.2d 1114, 1123 n.14 (2d Cir.), *cert. denied*, 400 U.S. 878 (1970). The registration is now "conclusive evidence of [plaintiff's] exclusive right" to use the mark for T-shirts. 15 U.S.C. § 1115(b). Thus, intervening events "have materially altered the legal principles governing resolution of the likelihood of confusion issue," entitling plaintiff to bring a new action. *DeCosta v. Viacom Int'l, Inc.*, 758 F. Supp. at 814. This is an independent basis for a new trial.

1958) (emphasis supplied).[29] Defendants raised no statutory defenses to defeat the statutory presumption,[30] and, as a matter of law, defendants' simple additions to plaintiff's registered mark could not overcome plaintiff's statutory right to exclusive use.[31]

This Court should grant certiorari to confirm that the Lanham Act means exactly what it says and that judicially created "exceptions" and "defenses" to clear statutory language are improper. *See Park 'N Fly, Inc. v. Dollar Park & Fly, Inc.*, 469 U.S. 189 (1985); *TVA v. Hill*, 437 U.S. 153, 173, 194-95 (1978). Here, the majority did much

---

[29] *See also Keds Corp. v. Renee Int'l Trading Corp.*, 888 F.2d 215, 222 (1st Cir. 1989); *International Kennel Club v. Mighty Star, Inc.*, 846 F.2d 1079, 1088 (7th Cir. 1988); *United States Jaycees v. Philadelphia Jaycees*, 639 F.2d at 142; *Wella Corp. v. California Concept Corp.*, 558 F.2d 1019, 1022 (C.C.P.A. 1977); *James Burrough, Ltd. v. Sign of Beefeater, Inc.*, 540 F.2d at 273; *Anti-Defamation League of B'Nai B'Rith v. National Mexican Am. Anti-Defamation Committee, Inc.*, 510 F.2d 1246, 1247-48 (D.C. Cir. 1975); *Carl Zeiss Stiftung v. VEB Carl Zeiss Jena*, 433 F.2d at 706. Where, as here, the trademark is strong, a defendant may not escape infringement even by adding highly distinctive matter. *See, e.g., Levi Strauss & Co. v. Blue Bell, Inc.*, 632 F.2d at 822.

[30] In addition to the eight defenses available even against incontestable marks under § 33(b), registered marks are subject to other statutory defenses, including those in Section 2 (*e.g.*, descriptiveness). *See* 15 U.S.C. § 1052. A defendant also might claim a contractual right to use the mark, such as a license.

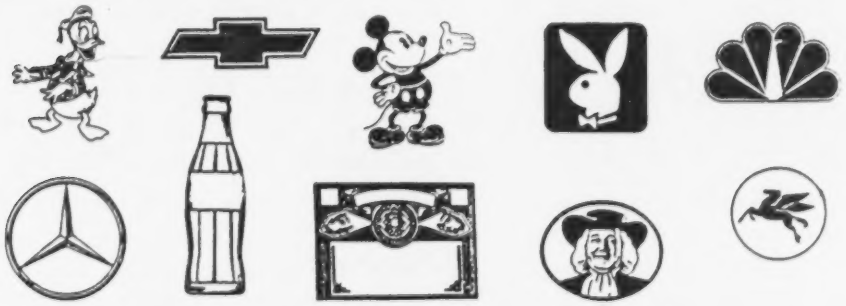
[31] *See Saxlehner v. Eisner & Mendelson Co.*, 179 U.S. 19 (1900) (adding second label to copied bottle and label insufficient to avoid infringement). A commercial pirate could not escape liability for infringement by adding "Myrtle Beach" and "This Beach is for You" to the word mark "Budweiser." Anheuser-Busch's federally registered design-only mark is entitled to no less protection.

> The exact duplication of the symbol . . . satisfying the confusion requirement of the law, words which indicate it was not authorized by the trademark owner are insufficient to remedy the illegal confusion. Only a prohibition of the unauthorized use will sufficiently remedy the wrong.

Boston Professional Hockey Ass'n v. Dallas Cap & Emblem Mfg., Inc., 510 F.2d at 1013.

more than merely fail to recognize the underlying premises of the Lanham Act; it constructively cancelled plaintiff's registration by effectively authorizing its use for any commercial purpose, so long as other generic, descriptive, and subordinate matter is added.

The Fourth Circuit's decision undermines Anheuser-Busch's extensive licensing program,[32] and those for other famous designs, because no manufacturer will pay a royalty to use a design when it can so **easily be appropriated for free.**[33] The consequence of this ruling could render unprotectable world-famous marks and permit anyone to trade on their hard-earned good will. There are not enough words in the English language to distinguish well-known design marks sufficiently to warrant their unrestrained exploitation on competitive products, and certainly adding "Myrtle Beach" and other descriptive, barely discernible words to marks such as the following cannot be what the Lanham Act contemplates:



The majority rationalized its constructive cancellation of plaintiff's mark, in part, by alluding to a fear of "creat[ing] a barrier to competition." 962 F.2d at 320. This reasoning

---

[32] Plaintiff's registered trademark design is the subject of more than 120 licenses involving thousands of products, including, *inter alia*, T-shirts, beach towels and bathing suits. A. 65-67, 210.

[33] *See Miles Shoes, Inc. v. Macy & Co.*, 199 F.2d 602, 603 (2d Cir. 1952) (A. Hand, J.), *cert. denied*, 345 U.S. 909 (1953); *Bon Ami Co. v. McKesson & Robbins, Inc.*, 93 F.2d 915, 916-17 (C.C.P.A. 1938). The "subsequent imitating" designs predicted in *Bon Ami* have arrived. *See* Civil Action File Nos. 4:91-1742-2, 4:91-1743-2, and 4:91-1744-2 pending in the South Carolina District Court.

is wholly contrary to the Lanham Act, which is premised on the proposition that trademarks

> are the essence of competition . . . . To protect trademarks, therefore, is to protect the public from deceit, to foster fair competition, and to secure to the business community the advantages of reputation and good will by preventing their diversion from those who have created them to those who have not.

S. Rep. No. 1333, 79th Cong., 2d Sess., 4 (1946). This Court repeatedly has stated that "trademarks foster competition and the maintenance of quality by securing to the producer the benefits of good reputation," *Two Pesos, Inc. v. Taco Cabana, Inc.*, 112 S. Ct. 2753, 2760 (1992),[34] and a grant of certiorari in this case is necessary to protect those statutory goals.

C. The Fourth Circuit's Newly Created Parody Defense for the Unauthorized, Competitive Use of a Federally Registered Mark Conflicts with the Lanham Act and Decisions in Other Circuits

Prior to the Fourth Circuit, **no authority** had ever sanctioned **as parody** the **total appropriation** of a **famous** trademark for commercial use on the **same goods distributed through the same channels of trade.** The Fourth Circuit reached its result by misconstruing the role of "parody" and ignoring the Lanham Act's likelihood of confusion test for trademark infringement, thus undermining the Act's goal of preventing consumer deception.

Justice Powell properly observed in dissent that "parody is not an affirmative defense to infringement," but "'is merely a way of phrasing the argument that confusion is

---

[34] *Accord Park 'N Fly, Inc. v. Dollar Park & Fly, Inc.*, 469 U.S. at 193, 198; *Scandia Down Corp. v. Euroquilt, Inc.*, 772 F.2d 1423, 1429-30 (7th Cir. 1985), *cert. denied*, 475 U.S. 1147 (1986). "The trademark laws are designed not only to prevent consumer confusion but also to protect 'the synonymous right of a trademark owner to control his product's reputation.'" *Dallas Cowboys Cheerleaders, Inc. v. Pussycat Cinema, Ltd.*, 604 F.2d 200, 205 (2d Cir. 1979).

unlikely.'" *Id.* at 327 (quoting 2 J. McCarthy, *supra*, § 31:38, at 671).[35] Thus, to avoid a finding of infringement in other Circuits, an alleged parody must convey:

> two simultaneous—and contradictory—messages: that it is the original, but that it is *not* the original and is instead a parody. [If] it does only the former . . ., it is not only a poor parody but also vulnerable under trademark law, since the customer will be confused.

Cliff's Notes, Inc. v. Bantam Doubleday Dell Pub. Group, Inc., 886 F.2d 490, 494 (2d Cir. 1989) ("Cliff's Notes" v. "Spy Notes" with "A Satire" five times on the cover).[36] Contrary to the Fourth Circuit's result, parody cannot coexist with likelihood of confusion because parody and confusing similarity are mutually exclusive. If a "name and logo create a substantially similar concept, image and feel which the Court finds is likely to create confusion," it is irrelevant that "there are differences that can be pointed out in a side-by-side comparison." *Mutual of Omaha Insurance Co. v. Novak*, 648 F. Supp. 905, 910 (D. Neb. 1986), *aff'd*, 836 F.2d 397 (8th Cir. 1987), *cert. denied*, 488 U.S. 933 (1988) ("Mutant of Omaha"). Any other rule undermines the Lanham Act goal of preventing consumer deception. *See, e.g., Dallas Cowboys Cheerleaders, Inc. v. Pussycat Cinema, Ltd.*, 604 F.2d at 206 n.9.

The Fourth Circuit's legal standard of parody, which requires merely "humor and levity," 962 F.2d at 322,

---

[35] The Lanham Act's lack of any statutory parody defense contrasts with the Copyright Act, which is premised on promoting creativity rather than preventing consumer confusion and which contains a statutory "fair use" defense encompassing parody. *See* 17 U.S.C. § 107 (1988).

[36] *Accord Hard Rock Cafe Licensing Corp. v. Pacific Graphics, Inc.*, 776 F. Supp. at 1462 (requiring "a clear distinction"). *See also Schieffelin & Co. v. Jack Co. of Boca, Inc.*, 725 F. Supp. 1314, 1323-24 (S.D.N.Y. 1989); *Tetley, Inc. v. Topps Chewing Gum, Inc.*, 556 F. Supp. 785, 792 (E.D.N.Y. 1983) ("Tetley Tea Bags" vs. "Petley Flea Bags" for stickers) ("heavy handedness of defendant's parody," together with use on different product, "assures that a clear distinction will be preserved").

rather than a "contradictory" message, conflicts fundamentally with decisions in other Circuits and the Lanham Act's goals. If a trademark owner uses its mark with humor and levity, an unauthorized copy of the mark in another humorous representation is confusingly similar infringement, not parody. The Lanham Act standard is likelihood of confusion and not, as the Fourth Circuit would have it, likelihood of laughter.

The Fourth Circuit refused to consider the complete message of a trademark copy to consumers in connection with its parody defense because, according to the majority, the statutorily-based marketplace factors analysis is "at best awkward in the context of parody." 962 F.2d at 321.[37] To the contrary, analyzing the interrelationship of market factors is essential to determining whether consumers will see any contradictory message in an unauthorized trademark copy appearing on the same goods in the same stores with the same advertising as the original. "[C]onverging marketing channels increase the likelihood of confusion," *AMF, Inc. v. Sleekcraft Boats*, 599 F.2d at 353, and in this case the converging market channels (identity of goods, retail outlets, advertising, etc.) were conceded and critical.

Justice Powell properly appreciated the correct "contradictory" standard of parody and its impact on this case, when he observed that defendants' copying fails to "eliminate the connection to Anheuser-Busch that follows from use of the Budweiser label"[38]:

---

[37] For this proposition, the majority cited *Cliff's Notes, Inc. v. Bantam Doubleday Dell Publishing Group, Inc.*, *supra*, but in that case the court was addressing a **literary parody** arguably raising First Amendment issues, not commercial exploitation of an entire registered mark on the identical goods sold to the same customers through the same channels of trade by the same types of advertising.

[38] A. 118. Defendants' designer conceded that "Venture Marketing did not market [its T-shirt] to make any statement about . . . Budweiser beer, but instead [it] marketed this shirt to make money." A. 121. Asked why the modest changes he had made to his copy of Reg. No. 1,372,700 were a parody, the designer answered, "I don't know." A. 176. Asked whether those changes were made to parody Reg. No. 1,372,700, the designer repeated, "I don't know." A. 178.

> [T]he subject matter of [defendants'] substituted words is not foreign to Anheuser-Busch, Budweiser, or even to beer. To the contrary, the "beach" is a familiar theme in Budweiser advertisements .... Neither "Myrtle Beach," which is a location not a company name, nor any of the other words establishes that a corporation other than Anheuser-Busch sponsors the T-shirt. Anheuser-Busch in fact has used its label frequently to endorse non-beer items [and in promotions affiliated with various geographical sites.] Nor does the fine-print reference to "Venture Marketing, Inc." tend to eliminate confusion. Anheuser-Busch requires its licensees' names to appear on their products.

962 F.2d at 326-27.[39] Defendants' T-shirt **is a product consumers would expect plaintiff to sponsor.** *See International Kennel Club v. Mighty Star, Inc.*, 846 F.2d at 1088. As Justice Powell succinctly concluded, defendants adopted "a theme (the beach) and a method (humor) ... fully consistent with Anheuser-Busch's marketing efforts."[40] Allowing such "fully consistent" commercial exploitation is not a parody, but an infringing use that causes consumer confusion and destroys a trademark owner's right to exclusively use and license its mark.

---

[39] The absence of a "clear distinction" between defendants' design and plaintiff's mark was established by Wings' buyer who, notwithstanding his experience, testified that he thought defendants' T-shirt "was a copy of a Budweiser shirt," and, even after he "examined [the product] closely," he "still wasn't sure." A. 235.

[40] 962 F.2d at 327. Defendants conceded that plaintiff "used parodies or humorous puns not unlike those on the subject T-shirt." A. 409. The majority asserted that a jury could find defendants' T-shirt a "readily recognizable" parody simply because it mimics words on the Budweiser beer can "by applying them to the beach." 962 F.2d at 321. However, no conflict exists between "Budweiser" and beaches, and "cleverness," is in no way contradictory to or parody of Anheuser-Busch. *Id.* at 322 (Powell, J., dissenting). "BEACH BUD" bottles (A. 526) and "BUD TO THE BEACH" beer cans (A. 518-19), dressed in sunglasses and swimming trunks, are only two among many examples of plaintiff's own clever use of its trademarks in association with beach themes.

Contrary to the majority's assertions,[41] enjoining defendants would not impinge on legitimate parody conveying a genuinely contradictory message. The mandate that a parody be "contradictory," which is a product of the Lanham Act likelihood of confusion test, requires an understanding of the impact of the trademark copy in the marketplace, and is completely consistent with, and in fact necessary to protect, both competition and expression.[42] Courts impinge on such values "only when they abandon the traditional trademark infringement test—likelihood of confusion," *Mutual of Omaha Ins. Co. v. Novak*, 836 F.2d at 403 n.10.[43]

Defendants should not "reap where [they have] not sown." *International News Serv. v. Associated Press*, 248 U.S. 215, 239 (1918).[44] The majority, under the guise of

---

[41] The Fourth Circuit majority perceived "evident tensions in the trademark field between commercial piracy and discouragement of competition, as well as between permissible parody and impermissible imitation." 962 F.2d at 322. The majority also asserted that application of the Lanham Act to purported parodies would create a "zone of immunity" hindering legitimate competition. *Id.*

[42] In *L.L. Bean, Inc. v. Drake Publishers, Inc.*, 811 F.2d 26, 32 n.3 (1st Cir.), *cert. denied*, 483 U.S. 1013 (1987), cited by the majority, the court stressed that "[a] parody which causes confusion in the marketplace implicates the legitimate commercial and consumer protection objectives of trademark law."

[43] The Lanham Act likelihood of confusion test actually protects legitimate parody. *See* Note, *Trademark Parody: A Fair Use and First Amendment Analysis*, 72 Va. L. Rev. 1079, 1099 (1986) ("[T]he confusion test of trademark infringement, properly conceived, poses little threat to the trademark parodist."); A. Langvardt, *Protected Marks and Protected Speech: Establishing the First Amendment Boundaries in Trademark Parody Cases*, 36 Vill. L. Rev. 1, 25 (1991) ("[W]hen the likelihood of confusion requirement is properly applied, it serves as a check on liability.").

[44] "A defendant's claim of parody will be disregarded where the purpose of the similarity is to capitalize on a famous mark's popularity for the defendant's own commercial use." *Hard Rock Cafe Licensing Corp. v. Pacific Graphics, Inc.*, 776 F. Supp. at 1462. *See also Grey v. Campbell Soup Co.*, 650 F. Supp. 1166, 1175 (C.D. Cal. 1986), *aff'd*, 830 F.2d 197 (9th Cir. 1987) (DOGIVA dog biscuits likely to be confused

protecting competition and expression, is in conflict with other Circuits, including the Eighth Circuit, which held in the *Mutual of Omaha* case that:

> [F]ailure to protect [plaintiff's] trademark rights would amount to an "unwarranted infringement of property rights," for it would "diminish [those] rights without significantly enhancing the asserted right of free speech."

836 F.2d at 402 (quoting *Lloyd Corp. v. Tanner*, 407 U.S. 551, 567 (1972)). This Court should grant certiorari to resolve this conflict.

Conclusion

The Fourth Circuit should not be permitted to peremptorily deny plaintiff's right to a ruling on its new trial motion by the district court. Moreover, the majority's opinion is, as Justice Powell observed, unprecedented. Neither the majority nor the defendants advance any case sanctioning the wholesale copying of a famous mark for commercial gain by use on identical goods. Such a result is contrary to the basic statutory tenets of the Lanham Act, and fails to protect the public or the legitimate economic expectations of trademark owners. A jury verdict cannot shield a result contrary to the statutory mandate of the Lanham Act and the trademark law of all other Circuits.

For the foregoing reasons, it is respectfully requested that the Court grant this petition and review and reverse the decision of the Court of Appeals for the Fourth Circuit.

---

with GODIVA chocolates); *Chemical Corp of Am. v. Anheuser-Busch, Inc.*, 306 F.2d 433, 437 (5th Cir. 1962), *cert. denied*, 372 U.S. 965 (1963) ("Where There's Life, There's Bugs").

Respectfully submitted

MILES J. ALEXANDER*
JERRE B. SWANN
VIRGINIA S. TAYLOR
WILLIAM H. BREWSTER
THEODORE H. DAVIS, JR.

KILPATRICK & CODY
1100 Peachtree Street
Atlanta, Georgia 30309
(404) 815-6500

**Counsel of Record*
for Petitioner

OF COUNSEL:

JOHN E. CUTTINO
TURNER, PADGET, GRAHAM &
LANEY
1901 Main Street
Columbia, South Carolina 29202
(803) 254-2200

APPENDIX

APPENDIX A

United States Court of Appeals,
Fourth Circuit.

Nos. 91-3039, 91-3043.

ANHEUSER-BUSCH, INCORPORATED,
Plaintiff-Appellee,

v.

L & L WINGS INCORPORATED,
Defendant-Appellant,

and

Venture Marketing, Incorporated;
Sunburst Screen Printing,
Defendants.

ANHEUSER-BUSCH, INCORPORATED,
Plaintiff-Appellee,

v.

VENTURE MARKETING,
INCORPORATED,
Defendant-Appellant,

and

L & L Wings, Incorporated; Sunburst
Screen Printing,
Defendants.

Argued Dec. 2, 1991.

Decided April 10, 1992.

Beer manufacturer brought trademark infringement action against manufacturer and distributor of T-shirt ad-

vertising beach. The United States District Court for South Carolina, C. Weston Houck, J., entered judgment for beer manufacturer notwithstanding verdict in favor of T-shirt manufacturer and appeal was taken. The Court of Appeals, Wilkinson, Circuit Judge, held that there was evidence from which jury could find that T-shirt which adopted general format of beer label, and advertised beach in language similar to that used to advertise beer on label, did not cause consumer confusion so as to violate Lanham Act.

Reversed.

Powell, Associate Justice, retired, sitting by designation, dissented and filed opinion.

Cort Flint, Jr., Cort Flint, P.A., Greenville, S.C., argued for defendants-appellants; Peter D. Hyman, The Hyman Law Firm, Florence, S.C., for defendant-appellant L & L Wings; Robert J. Reeves, Collins & Lacy, Columbia, S.C., for defendant-appellant Venture Marketing, on brief.

Floyd A. Gibson, Bell, Seltzer, Park & Gibson, Charlotte, N.C., argued, for plaintiff-appellee; John H. Thomas, William M. Atkinson, Charlotte, N.C., John E. Cuttino, Turner, Padget, Graham & Laney, Columbia, S.C., Richard W. Renner, Anheuser-Busch, Inc., St. Louis, Mo., on brief.

Before POWELL, Associate Justice (Retired), United States Supreme Court, sitting by designation, and WILKINSON and LUTTIG, Circuit Judges.

OPINION

WILKINSON, Circuit Judge:

In this case, plaintiff Anheuser-Busch sued defendants for selling souvenir T-shirts that plaintiff claimed infringed its Budweiser beer trademarks. The jury returned a verdict in favor of defendants, finding that defendants' T-shirt

design did not create a likelihood of consumer confusion, but the district judge granted plaintiff's motion for judgment notwithstanding the verdict. We reverse. The record reveals sufficient differences between the T-shirt design and plaintiff's trademarks to permit the jury to conclude that consumer confusion was unlikely. Accordingly, we think the district judge improperly substituted his judgment as to likelihood of confusion for that of the jury, and we remand with instructions to reinstate the jury verdict in favor of defendants.

I.

In 1987, Michael Berard was a student at the University of North Carolina at Chapel Hill. In order to supplement his income, Berard decided to go into the business of designing and selling T-shirts. During 1987, Berard devised a T-shirt design that he planned to sell as a souvenir of Myrtle Beach. That design depicted a beer can with a red, white and blue label. The words on the can did not refer to beer, however, but only to Myrtle Beach.

In 1988, Berard incorporated Venture Marketing, Inc., (Venture) in order to manufacture and wholesale his T-shirts. Venture marketed the Myrtle Beach T-shirts through L & L Wings, Inc., (Wings) which operates a number of retail beach stores at Myrtle Beach, South Carolina and at other beaches. Wings purchased over 20,000 shirts from Venture.[1]

In 1989 Anheuser-Busch, Inc., brought this trademark infringement action against Venture and Wings. Anheuser-Busch alleged that the T-shirt design was confusingly similar to the Budweiser beer label, a registered trademark

---

[1] Venture subsequently marketed a series of T-shirts that incorporated the same beer can design as the Myrtle Beach T-shirts, but that substituted the names of other beaches for Myrtle Beach. Those T-shirts are at issue in this case as well, but for the sake of simplicity we refer here only to the Myrtle Beach T-shirt.

which Anheuser-Busch had used on its own line of T-shirts and other apparel. Anheuser-Busch complained that the Myrtle Beach T-shirt infringed its trademarks because consumers were likely to believe the T-shirt was sold or sponsored by Anheuser-Busch. The case was tried before a jury for three days, and the jury returned a verdict in favor of the defendants. Anheuser-Busch filed a motion for j.n.o.v. or, in the alternative, for a new trial. After briefing and argument, the district judge granted the j.n.o.v. motion, holding that the evidence before the jury permitted only one reasonable conclusion: that the T-shirt created a likelihood of confusion and thus infringed Anheuser-Busch's trademarks. Accordingly, the district court entered judgment on the question of liability in favor of Anheuser-Busch, and took the motion for a new trial under advisement pending appeal. Venture and Wings then brought this appeal.

II.

Under the Lanham Act, a registered trademark holder has a right to prevent another's use of a trademark that is "likely to cause confusion, or to cause mistake, or to deceive." 15 U.S.C. § 1114(1)(a). *See Shell Oil Co. v. Commercial Petroleum, Inc.*, 928 F.2d 104, 108 (4th Cir. 1991). In other words, an unauthorized use of a trademark infringes the trademark holder's rights if it is likely to confuse an "ordinary consumer" as to the source or sponsorship of the goods. *Ford Motor Co. v. Summit Motor Products, Inc.*, 930 F.2d 277, 293 (3d Cir. 1991); 2 J. McCarthy, *Trademarks and Unfair Competition* § 23:28 (1984). This pivotal trademark issue is particularly amenable to resolution by a jury for two reasons. First, the jury, which represents a cross-section of consumers, is well-suited to evaluating whether an "ordinary consumer" would likely be confused. Second, the likelihood of consumer confusion is an "inherently factual" issue that depends on the unique facts and circumstances of each case. *Levi Strauss & Co.*

v. Blue Bell, Inc., 778 F.2d 1352, 1356 n. 5 (9th Cir. 1985). Likelihood of confusion is "frequently a fairly disputed issue of fact on which reasonable minds may differ," *Warner Bros., Inc. v. American Broadcasting Cos.*, 720 F.2d 231, 246 (2d Cir. 1983), and has long been recognized to be "a matter of varying human reactions to situations incapable of exact appraisement." *Colburn v. Puritan Mills, Inc.*, 108 F.2d 377, 378 (7th Cir. 1939).

A district judge may overturn a jury verdict on a motion for j.n.o.v. only if "there is no legally sufficient evidentiary basis for a reasonable jury to have found for [the prevailing] party." Fed.R.Civ.P. 50(a)(1). In making this determination, the judge is not to weigh the evidence or appraise the credibility of witnesses, but must view the evidence in the light most favorable to the non-moving party and draw legitimate inferences in its favor. *Mays v. Pioneer Lumber Corp.*, 502 F.2d 106, 107 (4th Cir. 1974). Our review of the district court's action is de novo. Here we believe the district judge improperly assumed the jury's role of determining whether an ordinary consumer would likely be confused by the T-shirt, and we reverse the court's entry of j.n.o.v.

The jury was entitled to conclude that consumer confusion was unlikely based on a number of conspicuous differences between the T-shirt design and the Budweiser label. First, the T-shirt design makes no reference of any sort to Anheuser-Busch or Budweiser. By contrast, the Budweiser label displays a number of prominent indications of the product's source or sponsor: the name "Budweiser" flanked on either side by the word "genuine"; the geographic designation "Anheuser-Busch, Inc., St. Louis, Mo."; the letters "AB" for Anheuser-Busch; and the Anheuser-Busch trademark depicting an eagle in the middle of the letter "A." With respect to all of these, the T-shirt design either omits them entirely or replaces them with references to the beach. The T-shirt design replaces the Budweiser name with the words "Myrtle Beach"; substi-

tutes the words "Myrtle Beach, S.C." for "Anheuser-Busch, Inc., St. Louis, Mo."; and replaces the letters "AB" with "SC." In addition, the T-shirt eliminates the Anheuser-Busch trademark "A" and omits the word "genuine."

Second, the T-shirt replaces the Budweiser label's descriptions of the beer with analogous language descriptive of the beach. The Budweiser label reads as follows:

> This is the famous Budweiser beer. We know of no brand produced by any other brewer which costs so much to brew and age. Our exclusive Beechwood Aging produces a taste, a smoothness, and a drinkability you will find in no other beer at any price.

On the Venture Marketing T-shirt design, these sentences are replaced with a description of the beach:

> This is the famous beach of Myrtle Beach, S.C. We know of no other resort in any state which lays claim to such a rich history. The unspoiled beaches, natural beauty, and southern hospitality compose a mixture you will find on no other beach in any state.

Similarly, the descriptive words at the bottom of the Budweiser label—announcing that the beer is "Brewed by our original process from the Choicest Hops, Rice and Best Barley Malt"—are replaced in the T-shirt design with words proclaiming that "Myrtle Beach contains the Choicest Surf, Sun, and Sand."

Third, the T-shirt design incorporates its own beach slogans in place of the Budweiser beer slogans. The Budweiser label includes the slogan "King of Beers" under the Budweiser name. On the T-shirt, this is replaced with the words "King of Beaches." In addition, the T-shirt mimics another Budweiser slogan, "This Bud's for You," with its own slogan, "This Beach is for You."

Together, we think these differences are sufficient at least to create a reasonable jury question on the issue of

likelihood of confusion. The jury had the opportunity to visually examine the T-shirt and to compare it with the Anheuser-Busch trademarks. We cannot say that the jury's conclusion was the only one it could have reached, but neither are we able to say that its verdict was unreasonable. In this regard, our dissenting brother faithfully presents Anheuser-Busch's side of the jury argument. To believe that the jury should have heard this argument is not to say that the jury was required to accept it.

III.

Anheuser-Busch suggests two reasons why we should disregard the jury verdict in this case. First, it contends that a judgment in its favor was compelled because the T-shirt incorporated a beer label design that intentionally imitated the non-verbal portion of the Budweiser label. At trial, Michael Berard admitted that he had patterned the T-shirt's beer label after the basic Budweiser format, and it is undisputed that he was successful in that endeavor. In Anheuser-Busch's view, this similarity of format by itself infringes its registered trademark in the Budweiser beer label design.

We disagree. Anheuser-Busch would have us isolate the non-verbal portion of the T-shirt design, while ignoring the substantial verbal differences that set it apart from the Budweiser label. Under the Lanham Act, however, a holder of a registered trademark is entitled to protection only from uses of the mark that create a likelihood of consumer confusion. 15 U.S.C. § 1114(1)(a). The statutory standard for infringement does not depend on how closely a fragment of a given use duplicates the trademark, but on whether the use in its entirety creates a likelihood of confusion. In making that determination, we must examine the allegedly infringing use in the context in which it is seen by the ordinary consumer; we must look not only at the portion of the T-shirt that duplicates the Budweiser label design, but at the T-shirt as a whole as sold in the

marketplace. *See Homeowners Group, Inc. v. Home Marketing Specialists, Inc.*, 931 F.2d 1100, 1109 (6th Cir. 1991); *Franklin Mint Corp. v. Master Mfg. Co.*, 667 F.2d 1005, 1007 (C.C.P.A. 1981). The jury examined the T-shirt as a whole and reasonably concluded that consumer confusion was unlikely.

Second, Anheuser-Busch argues that the jury verdict must be overturned because there was insufficient evidence to support it under the factors announced in *Pizzeria Uno Corp. v. Temple*, 747 F.2d 1522, 1527 (4th Cir. 1984). In that case, this court identified seven factors that have been considered in determining whether there is a likelihood of confusion: the strength of the plaintiff's mark, the degree of similarity between the two marks, the similarity of the goods they identify, the similarity of the facilities used in the businesses, the similarity of the advertising, the defendant's intent, and the presence of actual confusion. *Id.* The district judge evaluated the evidence presented to the jury under these seven factors, and found that although there was no evidence of actual confusion, other factors favored the plaintiff: plaintiff's trademarks were unquestionably strong, the T-shirt design was similar to the Budweiser label, the goods the marks identify were identical, and the facilities and advertising used by the parties were similar.

We believe, however, that the district judge misconstrued the nature of the *Pizzeria Uno* factors in overturning the jury's verdict. The "factors" announced in *Pizzeria Uno* are not meant to be a "rigid formula" for infringement. *Murphy v. Provident Mut. Life Ins. Co.*, 923 F.2d 923, 928 (2d Cir. 1990). *See also Lois Sportswear, U.S.A., Inc. v. Levi Strauss & Co.*, 799 F.2d 867, 872 (2d Cir. 1986). Rather, the *Pizzeria Uno* factors are only a guide—a catalog of various considerations that may be relevant in determining the ultimate statutory question of likelihood of confusion. As this circuit recognized in *Pizzeria Uno*, not all of the factors are of equal importance,

nor are they always relevant in any given case. 747 F.2d at 1527.

In this case, we think the jury was entitled to give decisive weight to the predominant differences between the T-shirt design and the Budweiser label. Where there is no evidence of actual confusion and a jury reasonably concludes that there is no likelihood of confusion because of the differences between the marks, consideration of the remaining *Pizzeria Uno* factors is unnecessary. We recognize, of course, that the likelihood of consumer confusion may be affected not only by the intrinsic similarity of two trademarks, but also by certain extrinsic factors such as the strength of the plaintiff's mark and the similarity of the products, sales outlets, and advertising. At the same time, however, these extrinsic factors are insufficient by themselves to establish likelihood of confusion absent some threshold of intrinsic similarity between the plaintiff's trademark and the defendant's alleged infringement. *Sun-Fun Products, Inc. v. Suntan Research & Development, Inc.*, 656 F.2d 186, 189 (5th Cir. 1981). The Lanham Act was obviously not intended to create a barrier to competition by preventing the use of distinguishable trademarks to market similar goods through identical channels. *See Anti-Monopoly, Inc. v. General Mills Fun Group*, 611 F.2d 296, 300-01 (9th Cir. 1979) (trademarks are designed to protect consumers from being misled, not to "further or perpetuate product monopolies"). Indeed, the marketing of commodities would be impaired if these external factors were assigned controlling weight in cases where the subject trademarks are readily distinguishable. In this case, the extrinsic factors—including the fact that the T-shirt competed with Anheuser-Busch's own product line—were appropriate for the jury to consider. We think, however, that there were sufficient intrinsic differences between the T-shirt and the Anheuser-Busch trademarks to permit a reasonable jury to find that consumer confusion was un-

likely irrespective of the evidence under those extrinsic considerations.

In short, the most important factor in this particular case was whether plaintiff's mark and defendant's T-shirt design looked alike in the eyes of the ordinary consumer. We think the jury was uniquely positioned to make the critical determination in that regard.

IV.

At trial, Michael Berard testified that his intent in creating the T-shirt design was to parody the Budweiser beer label. The crux of his defense was that the T-shirt—as parody—was especially unlikely to create confusion in the minds of ordinary consumers. We think that a reasonable jury could find that the T-shirt was readily recognizable as parody, and that such a finding provides additional support for the jury's verdict.

Anheuser-Busch, however, insists that appellants' T-shirt design has no element of parody because its purpose was to make money and not to make any commentary about Budweiser beer. We disagree. The T-shirt design fits a conventional definition of trademark parody—it is "a simple form of entertainment conveyed by juxtaposing the irreverent representation of the trademark with the idealized image created by the mark's owner." *L.L. Bean, Inc. v. Drake Publishers, Inc.*, 811 F.2d 26, 34 (1st Cir. 1987). The T-shirt design mimics the characteristic turns of phrase on the Budweiser label by applying them to the beach: the "taste," "smoothness," and "drinkability" found "in no other beer at any price" become the "unspoiled beaches, natural beauty, and southern hospitality" composing a "mixture you will find on no other beach in any state"; the beer's ingredients—the "Choicest Hops, Rice and Best Barley Malt"—are imitated by the "Choicest Surf, Sun, and Sand"; "King of Beers" is changed to "King of Beaches"; and "This Bud's For You" is mimicked by "This

Beach is For You." Berard testified that this "irreverent representation" was calculated to parody or satirize the Budweiser label, and we think the jury was entitled to agree that it had that effect.[2]

The district court unfortunately ignored the issue of parody in evaluating the sufficiency of the evidence to support the jury's verdict. In so doing, the judge failed to recognize that the multi-factored inquiry under *Pizzeria Uno* "is at best awkward in the context of parody." *Cliffs Notes*, 886 F.2d at 495 n. 3. Outside the context of parody, for example, intentional similarities between trademarks may lead to a presumption of a likelihood of confusion. *Osem Food Industries Ltd. v. Sherwood Foods, Inc.*, 917 F.2d 161, 164-65 (4th Cir. 1990). In cases of parody, however, courts have concluded that intentional similarity is unavoidable: "[T]he keystone of parody is imitation. It is hard to imagine, for example, a successful parody of Time magazine that did not reproduce Time's trademarked red border." *Cliffs Notes*, 886 F.2d at 494. *See also Jordache Enterprises, Inc. v. Hogg Wyld, Ltd.*, 828 F.2d 1482, 1485 (10th Cir.1987).

Courts have further recognized that although parody necessarily evokes the original trademark, effective parody also diminishes any risk of consumer confusion. *See Jordache*, 828 F.2d at 1486; *Universal City Studios, Inc. v. Nintendo Co.*, 746 F.2d 112, 116 (2d Cir.1984). Successful trademark takeoffs dispel consumer confusion by conveying just enough of the original design to allow the consumer to appreciate the point of the parody. *Cliffs Notes*,

---

[2] Some courts have held that trademark parody is entitled to First Amendment protection. *See Cliff's Notes, Inc. v. Bantam Doubleday Dell Pub. Group, Inc.*, 886 F.2d 490, 493 (2d Cir. 1989); *L.L. Bean*, 811 F.2d at 33-34. Given our decision to reinstate the jury verdict under the statutory standard, however, we have no occasion to reach defendants' contention that the First Amendment provides an independent basis for ruling in their favor.

886 F.2d at 494. Here the T-shirt necessarily adopts the basic format of the Budweiser label, but we think the similarities merely convey the message that the T-shirt is a parody of the original, and are not indicative of consumer confusion. The substantial differences detailed above would at least permit a jury to conclude that the T-shirt design was nothing more than a commentary on the pleasures of beach life that effectively parodied the Budweiser label but could hardly be confused with it.

[7] Anheuser-Busch would also have us give substantial weight to defendants' intent to draw on the "commercial magnetism" of the Budweiser label. It is true that appellants' primary motive in creating the T-shirt design was to make a profit, but the relevant intent in trademark cases is not merely an intent to profit, which would condemn all commercial parody, but an "intent to confuse the buying public." *Pizzeria Uno*, 747 F.2d at 1535. Ordinarily, an intent to profit from the original is the same thing as an intent to confuse—the infringer benefits only if consumers confuse his trademark with the original. But that equation does not hold in the context of parody. An alleged infringer may intend to benefit from the original trademark without ever intending or causing consumer confusion:

> In one sense, a parody is an attempt "to derive benefit from the reputation" of the owner of the mark, if only because no parody could be made without the initial mark. The benefit to the one making the parody, however, arises from the humorous association, not from public confusion as to the source of the marks. A parody relies upon a difference from the original mark, presumably a humorous difference, in order to produce its desired effect.

Jordache, 828 F.2d at 1486, quoting *Sicilia Di R. Biebow & Co. v. Cox*, 732 F.2d 417, 431 (5th Cir.1984).

An intent to parody, then, is an intent to benefit from the original trademark, but such an intent is not necessarily probative of a likelihood of consumer confusion. We cannot assume that the commercial success of the Myrtle Beach T-shirt resulted from consumer confusion; consumers may have been moved to buy the T-shirt by the simple fact that they were amused by the cleverness of its design.

Throughout this litigation, Anheuser-Busch has invited the court to place dispositive weight upon factors which are at best proxies for the ultimate statutory standard—whether the T-shirt is "likely to cause confusion." 15 U.S.C. § 1114(1)(a). Similarity of format and intent to profit, however, are not precise equivalents of the dispositive statutory language. The jury was entitled to find that the statutory standard did not condemn appellants' humorous takeoff on the Budweiser label. The purpose of the Lanham Act is to eliminate consumer confusion, not to banish all attempts at poking fun or eliciting amusement. *Elsmere Music, Inc. v. National Broadcasting Co.*, 623 F.2d 252, 253 (2d Cir.1980). The statute is designed to protect consumers from product misinformation, not to deprive the commercial world of all humor and levity. In this case, the ordinary consumers who served as jurors reasonably concluded that the T-shirt eliminated any risk of confusion, and we refuse to interfere with that verdict.

V.

Our dissenting brother's standard is so broad that it would banish virtually all attempts at humorous takeoffs on trademarks as a matter of law. The dissent would establish a zone of immunity for any trademark that could lay claim to strength and familiarity—the very marks for which parody is most likely. Its view is that almost any imitation of design, no matter how humorous or distinct the accompanying lyrics or verbiage, will run afoul of the

Lanham Act. We think the evident tensions in the trademark field between commercial piracy and discouragement of competition, as well as between permissible parody and impermissible imitation, are often best resolved by a jury on a case-by-case basis. The balance established by the Lanham Act risks serious disturbance when courts too readily assume the roles of ordinary consumers and interpose sweeping pronouncements of law.

In sum, this was a jury verdict that should have been sustained. We thus reverse the district court's entry of j.n.o.v. and instruct it to reinstate the jury verdict.[3]

REVERSED.

---

[3] The district court held under advisement appellee's motion for a new trial, and in so doing contravened the express mandate of Rule 50 of the Federal Rules of Civil Procedure. When alternative motions for j.n.o.v. and for a new trial are made, Rule 50(c)(1) requires that the district court rule on both of them. The policy behind this directive is clear: "If the court grants judgment notwithstanding the verdict and fails to act on the alternative motion for a new trial, litigation will be needlessly protracted should the appellate court find that the grant of judgment was erroneous." 9 C. Wright & A. Miller, *Federal Practice and Procedure* § 2539, at 610 (1971). In order to avoid such protracted litigation, this circuit has permitted the appellate dismissal of new trial motions in cases where the district judge failed to comply with the Rule 50(c) requirement to rule on the motion. *Mays v. Pioneer Lumber Corp.*, 502 F.2d 106, 110 (4th Cir. 1974). In *Mays*, this court reversed the district court's entry of j.n.o.v. and instructed the district court to reinstate the jury verdict based on its conclusion that "no useful purpose would be served by remanding." *Id.*

We think the course prescribed in *Mays* is appropriate here. We see no purpose in remanding where our grounds for reinstating the jury verdict necessarily comprehend the essence of appellee's new trial motion. The evident thrust of both parties' arguments is that either judgment is warranted for Anheuser-Busch as a matter of law, or that the jury verdict should be upheld. For the reasons noted above, the verdict of the jury was not contrary to the clear weight of the evidence and the instructions under which the case was submitted were in their totality unexceptionable. The trial ran for three days and both parties had every opportunity to place their case before the factfinder. A new

APPENDIX

T-Shirt Design

This Beach is for You!

POWELL, Associate Justice, dissenting:

The issue presented in this case is whether defendants' T-shirts infringe federally registered trademarks owned by Anheuser-Busch. A jury found no infringement. But the district court, finding insufficient evidence to support the jury's decision, entered judgment notwithstanding the verdict. The court today reverses, reinstating the jury verdict.

The court rests its decision on three related grounds: (i) the jury's finding of no likelihood of confusion is supported by differences between defendants' T-shirt design and the Budweiser label; (ii) defendants' T-shirt design withstands scrutiny under *Pizzeria Uno Corp. v. Temple*, 747 F.2d 1522 (4th Cir. 1984); and (iii) defendants' parody defense also supports the verdict. I disagree with this assessment of the

---

trial here would therefore not be warranted, and the case against defendants must be dismissed.

evidence and in certain respects with the characterization of the law that precedes it.[1]

I

Few can disclaim familiarity with the Budweiser label design.[2] It has been used by Anheuser-Busch as a trademark on beer cans since 1876 and on clothing since 1967. It has been the subject of extensive advertising. And it has been used to market several thousand products, including T-shirts sold in seaside stores. In short, it is, as the district court observed, "one of the strongest marks in this country, indeed in the world."

Not surprisingly, defendants concede that the strength of the trademark, the "paramount" consideration in the seven-factor analysis, *Pizzeria Uno*, 747 F.2d at 1527, favors Anheuser-Busch. Defendants further admit that three other factors support Anheuser-Busch's claim: (a) the similarity of the parties' goods (T-shirts),[3] (b) the similarity of

---

[1] I doubt that the likelihood-of-confusion determination is any more "amenable to resolution by a jury," as the court suggests, than other questions of fact. It may be less so. Some courts of appeals have concluded that this determination is a legal one. *See Cliffs Notes, Inc. v. Bantam Doubleday Dell Pub. Group, Inc.*, 886 F.2d 490, 495 (2d Cir. 1989); *Wynn Oil Co. v. Thomas*, 839 F.2d 1183, 1186 (6th Cir. 1988). Although ths circuit has said that the question is factual, *see Durox Co. v. Duron Paint Mfg. Co.*, 320 F.2d 882, 884 (4th Cir. 1963), there is no reason to conclude that the jury's resolution deserves special deference.

[2] At issue primarily is defendants' use of the non-verbal Budweiser label design, a separately registered trademark. Other protected marks also adorn Anheuser-Busch products, such as the trade name itself, "Budweiser," which defendants have not appropriated, and a variety of slogans (i.e., "This Bud's For You," "The King of Beers"), which defendants allegedly also have appropriated. My focus is on defendants' infringement of the label design.

[3] This concession also is significant. The similarity of products suggests not only that Anheuser-Busch may lose revenue for each sale by defendants but also, and perhaps more importantly, that a likelihood of

the outlets where such goods are sold (beach-front stores), and (c) the similarity of the parties' advertising.

That leaves a trio of considerations to support the jury verdict in favor of defendants—actual confusion, defendants' intent, and design similarities. I will consider each in turn.

Agreeing with the district court, the court in this case finds no proof of actual confusion between the Budweiser label design and defendants' T-shirt. That is a mistaken view. Anheuser-Busch did present evidence of actual confusion. Michael Kroshinsky, one of defendant Wings' wholesale purchasers, testified that his initial reaction to the T-shirt was that it "was a copy of a Budweiser shirt." Such proof is "substantial evidence" of likely confusion, *AMP Inc. v. Foy*, 540 F.2d 1181, 1186 (4th Cir.1976), particularly when it is a professional buyer who has been confused. This consideration thus also helps Anheuser-Busch.[4]

There also was evidence of intentional copying. Michael Berard, the founder of Venture Marketing and the designer of defendants' T-shirt, admitted that he intended to copy the Budweiser label design. This evidence creates a presumption of likelihood of confusion. *Osem Food Indus., Ltd. v. Sherwood Foods, Inc.*, 917 F.2d 161, 165 (4th Cir.1990). The court does not discuss this factor in its application of *Pizzeria Uno*. Instead, in Part IV of the opinion, it suggests that an exception to the presumption should apply when a defendant asserts that he intended to parody a particular trademark. I am not persuaded that such an exception is

---

confusion is apt to follow. Cf. *Yale Electric Corp. v. Robertson*, 26 F.2d 972, 974 (2d Cir. 1928) ("unless the borrower's use is so foreign to the owner's as to insure against any identification of the two, it is unlawful").

[4] The argument that Mr. Kroshinsky's testimony is not indicative of actual confusion is unpersuasive. Moreover, this argument does not present an obstacle to Anheuser-Busch's claim. The Lanham Act affords protection if confusion is "likely." Trademark owners may invoke the statute—and prevail under it—without establishing actual confusion. *Shell Oil Co. v. Commercial Petroleum, Inc.*, 928 F.2d 104, 108 (4th Cir. 1991).

applicable here. It is true that parody requires a degree of imitation. But the burden of disproving infringement should rest on one who intentionally uses another's trademark—even as parody. If the parody is strong, the burden will be light. If it is not, then a heavy burden is appropriate since the junior user is likely to benefit from its continuing affiliation with the "drawing power," *Mishawaka Rubber & Woolen Mfg. Co. v. S.S. Kresge Co.*, 316 U.S. 203, 205, 62 S.Ct. 1022, 1024, 86 L.Ed. 1381 (1942), of the senior user's mark. In short, I would not jettison this presumption in the parody context, and would find that this consideration favors Anheuser-Busch.

II

The court today relies, as it must, on the final factor—the similarity between the senior user's mark and the junior user's design. It gives "decisive weight" to the "predominant differences" between the T-shirt design and Anehuser-Busch's mark. In emphasizing this consideration, the court extends precedent and ignores the facts of this case.

A

To be sure, the court is correct in the abstract: that is, design differences can be determinative. "[S]ome threshold of intrinsic similarity" between marks is required before the "extrinsic" factors come into play. But I know of no precedent that allows conclusive weight to be given to this factor when a party has borrowed a distinctive mark, without making any discernible changes to it. and placed that mark on identical products marketed through identical commercial channels.

B

Even if as a legal matter the *Pizzeria Uno* analysis could be configured in such a manner, the evidentiary foundation

for such an analysis is lacking here.[5] In the court's view, what sustains the imitation are the words added to the Budweiser design. These words dispel confusion, the court maintains, in two ways: (i) the words are different from the language ordinarily appearing on a Budweiser beer can (i.e., "Myrtle Beach" is substituted for "Budweiser") and (ii) the words parody the Budweiser slogans and beer can (i.e., "This Beach Is For You" is substituted for "This Bud Is For You"). Neither argument is persuasive.

1

The court begins its "different words" analysis by emphasizing that defendants' T-shirt design makes "no reference of any sort to Anheuser-Busch or Budweiser." That by itself is of no importance. It is enough that the T-shirt adopts the Budweiser label design. This symbol needs no verbal cue to call Budweiser to mind. The symbol characterizes the name as much as the name does the symbol. It also is a separately registered trademark. For that reason, T-shirts bearing the non-verbal Budweiser label design, and nothing more, would infringe Anheuser-Busch's trademark.

True, defendants did not simply refrain from mentioning Budweiser or Anheuser-Busch by name; they also added language descriptive of the beach. Putting aside consideration of this language as a matter of parody, I suggest that the added words still fail to eliminate the connection to Anheuser-Busch that follows from use of the Budweiser label. First, the subject matter of the substituted words is not foreign to Anheuser-Busch, Budweiser, or even to beer. To the contrary, the "beach" is a familiar theme in Budweiser advertisements. Second, the substituted words to not rid the T-shirt of a Budweiser connection. Neither "Myrtle

---

[5] Notably, Venture Marketing, the defendant responsible for producing the T-shirt design, conceded that this factor favored Anheuser-Busch during oral argument on the motion for judgment notwithstanding the verdict.

Beach," which is a location not a company name, nor any of the other words establishes that a corporation other than Anheuser-Busch sponsors the T-shirt. Anheuser-Busch in fact has used its label frequently to endorse non-beer items.[6] Nor does the fine-print reference to "Venture Marketing, Inc." tend to eliminate confusion. Anheuser-Busch requires its licensees' names to appear on their products.

2

That brings me to the question of parody.[7] Parody is not an affirmative defense to an infringement claim.

> Rather, it is merely a way of phrasing the argument that confusion is unlikely. Because the purpose of trademark law is to protect the public from confusion, it would make no sense to say that a "parody" which is likely to confuse is permitted merely because it is a "parody."

2. McCarthy, *Trademarks and Unfair Competition*, § 31:38, at 671 (2d ed. 1984). In this instance, the "parody" does little to prevent consumer confusion as to the sponsor of defendants' T-shirt. It does not ridicule Budweiser or offer social commentary on the evils of alcohol.[8] Nor could it be

---

[6] For example, Anheuser-Busch has produced a T-shirt bearing the Budweiser label, the words "Trap Skeet," and a drawing of shotgun shells and skeet. It has also used the label in promotions affiliated with various geographical sites.

[7] Parody is (i) "[a] literary or artistic work that broadly mimics an author's characteristic style and holds it up to ridicule" and (ii) "[a] performance so bad as to be equivalent to intentional mockery." *The American Heritage Dictionary of the English Language*, at 954 (1976).

[8] Only parody in this "editorial or artistic" sense serves sufficiently strong First Amendment values to override government interests in trademark protection. *See L.L. Bean, Inc. v. Drake Publishers, Inc.*, 811 F.2d 26, 32-33 (1st Cir. 1987). Such would be the case, for instance, if Mothers Against Drunk Driving marketed T-shirts bearing a caricature of the Budweiser trademark. (In that context, incidentally, consumers

deemed "so obvious and heavy handed that a clear distinction was preserved in the viewer's mind between the source of the actual product and the source of the parody." *Mutual of Omaha Ins. Co. v. Novak*, 648 F.Supp. 905, 910 (D.Neb.1986), *aff'd*, 836 F.2d 397 (8th Cir.1987), *cert. denied*, 488 U.S. 933, 109 S.Ct. 326, 102 L.Ed.2d 344 (1988).

All that it does is play on the words of the Budweiser label, adopting a theme (the beach) and a method (humor) that is fully consistent with Anheuser-Busch's marketing efforts. *See Cliffs Notes*, 886 F.2d at 494 (requiring two marks to send "contradictory" "messages"). Moreover, since the attempted parody does not dissociate defendants' T-shirt from Anehuser-Busch's products, consumers will be just as likely to buy the T-shirt because of its continuing affiliation with Anheuser-Busch as because of its humor. That danger is particularly acute here since Anheuser-Busch and defendants compete in the same market. The parody here thus amounts to nothing more than a "merchandising short-cut," *S.S. Kresge Co.*, 316 U.S. at 205, 62 S.Ct. at 1024. I conclude that the parody defense falls far short of supporting the verdict.

* * * *

I agree with the district court that defendants' use of the Budweiser label design in the manner depicted in the Appendix establishes infringement as a matter of law.

I respectfully dissent.

---

would purchase the T-shirts precisely because they were not affiliated with Anheuser-Busch. That is not true here.) I would conclude that defendants' commercial speech, whose avowed aim was to convey "how great Myrtle Beach is," is not protected by the First Amendment from enforcement of the Lanham Act.

APPENDIX B

United States District Court
District of South Carolina—Florence Division

CASE NUMBER: CA 4:89-02247-2

ANHEUSER-BUSCH, INCORPORATED,
Plaintiff,

v.

L & L WINGS, INCORPORATED, and
VENTURE MARKETING, INCORPORATED,

ORIGINAL FILED
FEB 28 1991
ANN A. BIRCH, CLERK
FLORENCE, S.C.

AMENDED JUDGMENT IN A CIVIL CASE

☐ **Jury Verdict**. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☐ **Decision by Court**. This action came to hearing before the Court, and plaintiff's motion for judgment notwithstanding the Verdict having been duly heard and granted,

IT IS ORDERED AND ADJUDGED that judgment as to the liability issue is hereby entered for the plaintiff Anheuser-Busch, Incorporated against the defendants L & L Wings, Incorporated and Venture Marketing, Incorporated.

February 28, 1991
Date

Ann A. Birch
Clerk

/s/ Shirley Prather
(By) Deputy Clerk Shirley Prather

APPENDIX C

Transcript of the Motions Hearing before the Hon. C. Weston Houck, February 28, 1991

* * *

THE COURT: In The L & L Wings case, I'd like the Clerk to take notice that the motion for new trial was taken under advisement. I'm not sure I said that, but I'd like for there to be a record of it just in case I'm not here if it comes back, or if I'm here, have lapsed into a state of senility that wouldn't permit me to remember what I did.

* * *

APPENDIX D

§ 1114. Remedies: infringement; innocent infringement by printers and publishers

(1) Any person who shall, without the consent of the registrant—

> (a) use in commerce any reproduction, counterfeit, copy, or colorable imitation of a registered mark in connection with the sale, offering for sale, distribution, or advertising of any goods or services on or in connection with which such use is likely to cause confusion, or to cause mistake, or to deceive; or
>
> (b) reproduce, counterfeit, copy, or colorably imitate a registered mark and apply such reproduction, counterfeit, copy, or colorable imitation to labels, signs, prints, packages, wrappers, receptacles or advertisements intended to be used in commerce upon or in connection with the sale, offering for sale, distribution, or advertising of goods or services on or in connection with which such use is likely to cause confusion, or to cause mistake, or to deceive.

shall be liable in a civil action by the registrant for the remedies hereinafter provided. Under subsection (b) of this section, the registrant shall not be entitled to recover profits or damages unless the acts have been committed with knowledge that such imitation is intended to be used to cause confusion, or to cause mistake, or to deceive.

(2) Notwithstanding any other provision of this chapter, the remedies given to the owner of the right infringed shall be limited as follows: (a) Where an infringer in [sic] engaged solely in the business of printing the mark for others and establishes that he was an innocent infringer the owner of the right infringed shall be entitled as against such infringer only to an injunction against future printing; (b) where the infringement complained of is contained in or is part of paid advertising matter in a newspaper, mag-

azine, or other similar periodical the remedies of the owner of the right infringed as against the publisher or distributor of such newspaper, magazine, or other similar periodical shall be confined to an injunction against the presentation of such advertising matter in future issues of such newspapers, magazines, or other similar periodical: *Provided,* That these limitations shall apply only to innocent infringers; (c) injunction [sic] relief shall not be available to the owner of the right infringed in respect of an issue of a newspaper, magazine, or other similar periodical containing infringing matter when restraining the dissemination of such infringing matter in any particular issue of such periodical would delay the delivery of such issue after the regular time therefor, and such delay would be due to the method by which publication and distribution of such periodical is customarily conducted in accordance with sound business practice, and not to any method or device adopted for the evasion of this section or to prevent or delay the issuance of an injunction or restraining order with respect to such infringing matter.

§ 1115. Registration on principal register as evidence of exclusive right to use mark; defenses

(a) Evidentiary value; defenses

Any registration issued under the Act of March 3, 1881, or the Act of February 20, 1905, or of a mark registered on the principal register provided by this chapter and owned by a party to an action shall be admissible in evidence and shall be prima facie evidence of the registrant's exclusive right to use the registered mark in commerce on the goods or services specified in the registration subject to any conditions or limitations stated therein, but shall not preclude an opposing party from proving any legal or equitable defense or defect which might have been asserted if such mark had not been registered.

(b) Incontestability; defenses

If the right to use the registered mark has become incontestable under section 1065 of this title, the registration shall be conclusive evidence of the registrant's exclusive right to use the registered mark in commerce on or in connection with the goods or services specified in the affidavit filed under the provisions of said section 1065 subject to any conditions or limitations stated therein except when one of the following defenses or defects is established:

(1) That the registration or the incontestable right to use the mark was obtained fraudulently; or

(2) That the mark has been abandoned by the registrant; or

(3) That the registered mark is being used by or with the permission of the registrant or a person in privity with the registrant, so as to misrepresent the source of the goods or services in connection with which the mark is used; or

(4) That the use of the name, term, or device charged to be an infringement is a use, otherwise than as a trademark or service mark, of the party's individual name in his own business, or of the individual name of anyone in privity with such party, or of a term or device which is descriptive of and used fairly and in good faith only to describe to users the goods or services of such party, or their geographic origin; or

(5) That the mark whose use by a party is charged as an infringement was adopted without knowledge of the registrant's prior use and has been continuously used by such party or those in privity with him from a date prior to registration of the mark under this chapter or publication of the registered mark under subsection (c) of section 1062 of this title: *Provided, however,* That this defense or defect shall apply only

for the area in which such continuous prior use is proved; or

(6) That the mark whose use is charged as an infringement was registered and used prior to the registration under this chapter or publication under subsection (c) of section 1062 of this title of the registered mark of the registrant, and not abandoned: *Provided, however,* That this defense or defect shall apply only for the area in which the mark was used prior to such registration or such publication of the registrant's mark; or

(7) That the mark has been or is being used to violate the antitrust laws of the United States.

§ 1125. False designations of origin and false descriptions forbidden

(a) Civil action

Any person who shall affix, apply, or annex, or use in connection with any goods or services, or any container or containers for goods, a false designation of origin, or any false description or representation, including words or other symbols tending falsely to describe or represent the same, and shall cause such goods or services to enter into commerce, and any person who shall with knowledge of the falsity of such designation of origin or description or representation cause or procure the same to be transported or used in commerce or deliver the same to any carrier to be transported or used, shall be liable to a civil action by any person doing business in the locality falsely indicated as that of origin or in the region in which said locality is situated, or by any person who believes that he is or is likely to be damaged by the use of any such false description or representation.

(b) Importation

Any goods marked or labeled in contravention of the provisions of this section shall not be imported into the

United States or admitted to entry at any customhouse of the United States. The owner, importer, or consignee of goods refused entry at any customhouse under this section may have any recourse by protest or appeal that is given under the customs revenue laws or may have the remedy given by this chapter in cases involving goods refused entry or seized.

APPENDIX E

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 91-3039
CA-89-2247-4-2

ANHEUSER-BUSCH, INCORPORATED
Plaintiff-Appellee

v.

L&L WINGS, INCORPORATED
Defendant-Appellant

and

VENTURE MARKETING, INCORPORATED; SUNBURST SCREEN PRINTING
Defendants

No. 91-3043
CA-89-2247-4-2

ANHEUSER-BUSCH, INCORPORATED
Plaintiff-Appellee

v.

VENTURE MARKETING, INCORPORATED
Defendant-Appellant

and

L&L WINGS, INCORPORATED; SUNBURST SCREEN PRINTING
Defendants

On Petition for Rehearing with Suggestion for Rehearing In Banc

FILED
May 8, 1992

Appellee filed a petition for rehearing with suggestion for rehearing in banc. No member of the Court requested a poll on the suggestion for rehearing in banc, and the original judicial panel voted to deny the petition for rehearing.

The Court denies the petition for rehearing with suggestion for rehearing in banc.

Entered at the direction of Judge Wilkinson with the concurrence of Justice Powell and Judge Luttig.

For the Court,

/s/ Bert Montague
ACTING CLERK

APPENDIX F

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 91-3039(L)

ANHEUSER-BUSCH, INCORPORATED,
Plaintiff-Appellee,

versus

L&L WINGS, INCORPORATED,
Defendant-Appellant,

and

VENTURE MARKETING, INCORPORATED;
SUNBURST SCREEN PRINTING,
Defendants.

ORDER

FILED: May 18, 1992

Appellee has filed a motion for stay of mandate, with brief in support.

The Court grants stay of mandate pending timely application to the Supreme Court of the United States for a writ of certiorari.

For the Court—By Direction

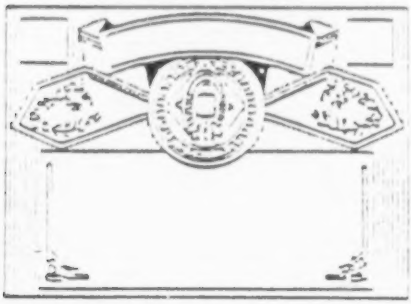
/s/ Bert M. Montague
Acting Clerk

APPENDIX G

Int. Cl.: 25
Prior U.S. Cl.: 39

United States Patent and Trademark Office
Reg. No. 1,372,700
Registered Nov. 26, 1985

TRADEMARK
Principal Register



ANHEUSER-BUSCH, INCORPORATED
(MISSOURI CORPORATION)
ONE BUSCH PLACE
ST. LOUIS, MO 63118

FOR: CLOTHING—NAMELY, T-SHIRTS, JACKETS, SWEATERS, HATS, AND SWEATSHIRTS, IN CLASS 25 (U.S. CL. 39).

FIRST USE 4-28-1967; IN COMMERCE 4-28-1967.

OWNER OF U.S. REG. NO. 902,321.

THE DRAWING IS LINED FOR THE COLOR RED, BUT NO CLAIM IS MADE AS TO COLOR.

SER. NO. 524,105, FILED 2-25-1985.

DEBORAH S. COHN,
EXAMINING ATTORNEY

APPENDIX H

This Beach is for You!

©Venture Marketing Inc.
1987 ALL RIGHTS RESERVED